85-2041 (1)

SUPREME COURT, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1985

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, *Petitioner,*

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Court of Appeals err in holding that, notwithstanding 28 U.S.C. §1334(d) (giving the court in which a bankruptcy petition is filed "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case") and 11 U.S.C. §541 (drawing into the debtor's bankruptcy estate "all legal or equitable interests of the debtor in property as of the commencement of the case"), the bankruptcy court in which a debtor files a petition for relief cannot exercise jurisdiction over property of the debtor as to which a creditor asserts a claim under a plan of arrangement confirmed in a prior bankruptcy case commenced over six years prior to commencement of the subsequent proceeding?

(2) Did the Court of Appeals err in holding that a lawful bankruptcy filing does not trigger the protection of the automatic stay provision, 11 U.S.C. § 362, against efforts to obtain title to property of the debtor's estate by enforcement of a plan of arrangement in a previous bankruptcy proceeding?

(3) Did the Court of Appeals err in holding that Congress intended in § 403(a) of the Bankruptcy Reform Act of 1978 (the "Code"), Pub. L. No. 95-598, 92 Stat. 2683 (1978), to deprive a debtor of the right to file a petition in bankruptcy more than six years after a prior petition which resulted in a discharge of indebtedness when the debtor would have had such a right under the Bankruptcy Act of 1898, former 11 U.S.C. § 1 et seq. (the "Act"), if the Act were still in existence, or under the Code, if the Code had been in existence at the time of the first petition?

(4) Did the Court of Appeals err in holding that a bankruptcy court, pursuant to its retention of jurisdiction

over a plan of arrangement confirmed in a previous bankruptcy proceeding, could enjoin a debtor and its creditors from proceeding with a bankruptcy reorganization commenced by the filing by certain unsecured creditors of an "involuntary" Chapter 7 petition?

(5) Did the Court of Appeals err in holding that a bankruptcy court need not permit a debtor to assert and need not hold an evidentiary hearing on a debtor's defenses that its single secured creditor, in its capacity as the debtor's tenant, has willfully and/or negligently mismanaged the debtor's principal tangible asset, a real estate development, before transferring title to such real estate development to the tenant-creditor pursuant to a contractually agreed upon plan of arrangement confirmed in a prior bankruptcy case?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Colony Square Company, a Georgia Limited Partnership, and the respondent, The Prudential Insurance Company of America.

In the proceedings below that pertained to issues arising from the petition filed by Colony Square Company under Chapter 11 of the Code, the Committee of Holders of Partnership Interests, formed with the approval of the United States Bankruptcy Court for the Western District of Pennsylvania, was an additional party, either appearing with or in support of Colony Square Company. A Committee of Unsecured Creditors was approved by the same Court and appeared with or in support of Colony Square Company before that Court and the United States Bankruptcy Court for the Northern District of Georgia in the same proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Colony Square Company, through its counsel, petitions for a writ of certiorari to review the decisions and judgments of the United States Court of Appeals for the Eleventh Circuit rendered in these related cases on January 10, 1986 and May 6, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated May 6, 1986 is reported at 788 F.2d 739 and is reproduced in the appendix hereto at 1a.[1] The opinion of the United States Court of Appeals for the Eleventh Circuit dated January 10, 1986 is reported at 779 F.2d 653 and is reproduced in the appendix hereto at 5a.

The orders and opinions of the United States District Court for the Northern District of Georgia, Atlanta Division dated June 27, June 26, April 4 and April 2, 1985 have not

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[1]The appendix to this petition, because of its voluminous nature and in accordance with Supreme Court Rule 21.1(k), is separately bound and presented. Citations to the appendix will be indicated as (a).

been reported. They are reproduced in the appendix hereto at 11a, 18a, 25a, and 26a, respectively.

The opinion of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated March 23, 1984 is reported at 40 Bankr. 603, and is reproduced in the appendix hereto at 64a. The two opinions of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated June 25, 1984 and the opinion dated May 11, 1984 are not reported. They are reproduced in the appendix hereto at 44a, 53a, and 57a, respectively.

The order of the United States Court of Appeals for the Third Circuit dated December 2, 1983 has not been reported, but the decision is noted at 725 F.2d 669. The order is reproduced in the appendix hereto at 72a.

The opinion of the United States District Court for the Western District of Pennsylvania dated April 18, 1983 is reported at 29 Bankr. 432 and is reproduced in the appendix hereto at 80a. Two orders dated November 9, 1983, are not reported; they are reproduced in the appendix at 74a and 77a.

The opinion of the United States Bankruptcy Court for the Western District of Pennsylvania dated May 10, 1982 is reported at 22 Bankr. 92 and is reproduced in the appendix hereto at 99a. The Order Amending Opinion of the same court dated May 20, 1982, is reproduced in the appendix hereto at 98a.

Additional orders and opinions relating to the cases under review are cited in this petition and reproduced in the appendix as appropriate.

JURISDICTION

Petitioner seeks review of two related decisions of the United States Court of Appeals for the Eleventh Circuit. A rehearing of the judgment and opinion dated and entered January 10, 1986 was timely sought and denied on March 14, 1986. No rehearing has been sought for the decision dated and entered May 6, 1986.

The jurisdiction of this Court to review the judgments of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

RULE 19.4 STATEMENT

Supreme Court Rule 19.4 states in part:

> When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

Petitioner submits that the questions involved in the two decisions sought to be reviewed on certiorari involve closely related questions. The parties to the two decisions are identical; the decisions arise from the same nucleus of facts; and both decisions reject Colony Square's contention that its second bankruptcy petition could not be summarily dismissed and the Bankruptcy Code's automatic stay could not be rendered void and inapplicable by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division. The Eleventh Circuit recognized this in its opinion dated May 6, 1986, which may be found in the appendix attached hereto at 1a. On page 3 of the Opinion (4a), the court noted that its decision therein was compelled by the decision previously rendered on January 10, 1986.

Petitioner submits that the two closely related Court of Appeals decisions address and decide important questions arising under the national bankruptcy policy contrary to the governing statute and decisions of other judicial circuits.

Petitioner therefore respectfully prays this Court to issue a writ of certiorari for review of both judgments pursuant to Supreme Court Rule 19.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the United States Constitution.

The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . .

Section 403(a) of the Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2683 (1978), Note Preceding 11 U.S.C. § 101.

§ 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [i.e., the Code] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act [i.e., the Code] had not been enacted.

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362.

§ 362. Automatic Stay. (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . , operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Section 727(a)(8) of the Bankruptcy Code, 11 U.S.C. § 727(a)(8).

§ 727. Discharge. (a) (a) The court shall grant the debtor a discharge, unless—

> . . . (8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition. . . .

Section 14c(5) of the Bankruptcy Act, 11 U.S.C. § 32c(5) (repealed).

§ 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) [i]n a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge, or had a composition or an arrangement by way of composition or a

wage earner's plan by way of composition confirmed under this Act; . . .

Section 541(a) of the Bankruptcy Code, 11 U.S.C. § 541(a).

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

28 U.S.C. § 1334(d).

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

STATEMENT OF THE CASE

A. Procedural and Factual Background

Petitioner, Colony Square Company ("Colony Square"), is a limited partnership having its principal place of business in Pittsburgh, Pennsylvania. Under its former name, Peachtree Fourteenth Limited Partnership, Colony Square was organized in August 1967 to acquire certain land in Atlanta, Georgia, for development as a multi-use real estate complex comprising office buildings, a hotel, apartment buildings, a parking garage and retail shops. By the autumn of 1975, Colony Square had succeeded in completing most of the construction and in creating the business arrangements in accordance with which the complex would be operated.

Because it was unable to meet its obligations as they came due, Colony Square petitioned the United States District Court for the Northern District of Georgia, Atlanta Division

(the "Atlanta District Court") on October 16, 1975 for an arrangement with its creditors under Chapter XII of the Bankruptcy Act of 1898 as then in effect.[2] By order dated March 30, 1977, the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (the "Atlanta Bankruptcy Court") confirmed the Plan of Arrangement ("Plan") for Colony Square that had been drafted and proposed by Respondent, The Prudential Insurance Company of America ("Prudential"), the principal secured creditor of Colony Square. The March 30, 1977 Order (the "Confirmation Order") discharged all indebtedness of Colony Square, except for its indebtedness to Prudential. Following confirmation of the Plan, Colony Square continued its business and incurred new indebtedness to several unsecured creditors.

The Plan included a Lease and a Moratorium Agreement that contemplated, in general, that Colony Square would continue its ownership of most of the Colony Square Complex, including the office buildings, the hotel, the parking garage and the retail mall (the "Leased Property"), with Prudential, as lessee, responsible for its management. In accordance with the Plan, each year, the "Net Cash Flow" (as defined in the Lease) from the complex was credited to Colony Square as rent under the Lease, and was applied against Colony Square's debt to Prudential. Significantly, the Lease provided that Prudential would have complete management control over the Leased Property. Prudential took over possession and management of the Leased Property on March 1, 1977 and has been in complete control since that time.

The Moratorium Agreement provided, *inter alia*, that prior to January 1, 1982, Colony Square had no obligation to

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[2]The Bankruptcy Act of 1898, as amended, will be referred to in this Petition as the "Act"; the Bankruptcy Reform Act of 1978, which replaced the Act, will be referred to as the "Code". Since many of the events leading up to this petition, the Code was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). The amendments, including the replacement of 28 U.S.C. § 1471 with 28 U.S.C. § 1334 and the revision of 11 U.S.C. § 362(a), are not material for present purposes.

make payments of principal on account of its indebtedness to Prudential, except to the extent of the rental payments received from Prudential under the Lease. It further provided that the unpaid balance of such indebtedness with interest as specified was due on January 1, 1982. In the event Colony Square did not bring its indebtedness to Prudential current prior to January 1, 1982, the original maturity date of the debt would be reinstated. The Moratorium Agreement also provided that, if Colony Square did not bring the secured debt owed to Prudential current or pay the unpaid principal balance of the indebtedness prior to January 1, 1982, Prudential would be entitled to foreclose or, at its option, to purchase the property securing the indebtedness in exchange for cancellation of Colony Square's indebtedness to Prudential.

Colony Square has contended that the terms of the Lease, Moratorium Agreement and Plan placed Colony Square and Prudential in a relationship of trust. For several years, Colony Square has claimed that, by failing to manage the Leased Property with due care in a reasonably skillful manner and consistent with good business practices, Prudential violated the fiduciary duty inherent in such a relationship, prevented Colony Square from bringing its indebtedness current, and made it impossible for Colony Square to comply with the terms and conditions of the Plan and the Moratorium Agreement. Further, Colony Square has contended that Prudential mismanaged the Leased Property deliberately so that it could gain title to the Leased Property since such title was of far greater value to Prudential than the payment of Colony Square's debt.[3]

Because Colony Square could not meet its obligations under the Moratorium Agreement, it filed a petition under

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[3]On April 29, 1986, the Atlanta Bankruptcy Court entered an Order granting Prudential's Motion For Summary Judgment with respect to Colony Square's mismanagement claims. In the Order, the Atlanta Bankruptcy Court relied on certain technical provisions of the Lease and refused to reach the merits of Colony Square's mismanagement claims. Colony Square timely noticed its appeal to the Atlanta District Court from this Order on May 9, 1986.

Chapter 11 of the Code on January 28, 1982 in the United States Bankruptcy Court for the Western District of Pennsylvania ("Pittsburgh Bankruptcy Court"). By motion, Prudential disputed the Pittsburgh Bankruptcy Court's jurisdiction and venue, questioned Colony Square's good faith, and challenged the timeliness of the petition. The Pittsburgh Bankruptcy Court, in an opinion by the Honorable Joseph L. Cosetti (99a), concluded that: (1) it did have jurisdiction over Colony Square's January 28, 1982 petition notwithstanding the Atlanta Bankruptcy Court's retention of jurisdiction over the Plan in the Chapter XII proceeding;[4] (2) Colony Square filed the petition in good faith; (3) the petition was timely filed; (4) abstention under 11 U.S.C. § 305 was not proper; (5) venue existed in the Pittsburgh Bankruptcy Court; and (6) abstention under the then effective 28 U.S.C. § 1471(d) was not proper. The Pittsburgh Bankruptcy Court also made certain findings of fact, including that Colony Square's general partner has its principal place of business in Pittsburgh, Pennsylvania.

Prudential appealed the Pittsburgh Bankruptcy Court's decision to the United States District Court for the Western District of Pennsylvania ("Pittsburgh District Court"), which, in dicta, was critical of Judge Cosetti's jurisdictional holding but which itself exercised jurisdiction by transferring the case to the Atlanta District Court on forum non conveniens grounds (80a); the case was then referred to Bankruptcy Judge Hugh Robinson who had presided over the Colony Square Chapter XII proceedings.[5] Judge Robinson dismissed Colony Square's Chapter 11 case by Order dated March 23, 1984 (64a). That Order was affirmed by the Atlanta District Court

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[4]The language by which the Atlanta Bankruptcy Court purported to retain jurisdiction is quoted in Judge Cosetti's opinion at 99a-100a.

[5]Colony Square has contended that Judge Robinson had a significant conflict of interest requiring his disqualification under 28 U.S.C. § 455. In its Motion for Disqualification filed on August 31, 1984, Colony Square maintained that both Colony Square's Chapter XII case (which Judge Robinson viewed as a proceeding for liquidation of the Debtor) and its Chapter 11 case could not be handled by the same bankruptcy judge. Colony Square's

(Continued on next page)

and the Eleventh Circuit (11a; 1a). Review of the Eleventh Circuit's decision is sought here.

On May 14, 1984, the Atlanta Bankruptcy Court issued an Order (57a) that denied Colony Square the opportunity to assert Prudential's mismanagement as a defense to Prudential's efforts to obtain record title to the Leased Property. The

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(Continued)
Motion for Disqualification of Judge Robinson was denied by Judge Robinson by an opinion/order dated October 30, 1984. That decision was affirmed by the Atlanta District Court on December 29, 1984.

In May of 1985, Colony Square counsel learned facts indicating that Judge Robinson's bias and prejudice were far worse than imagined. Only two hours after submission of Colony Square's final brief and conclusion of oral argument regarding Prudential's effort to obtain title to the Leased Property, Judge Robinson telephoned lead Prudential counsel on an *ex parte* basis and requested Prudential counsel to author the Court's order/opinion purporting to grant Prudential's Motion in this matter and to transfer title of Colony Square's $175 million property to Prudential. The order, *precisely as secretly authored by Prudential counsel*, was entered by Judge Robinson without notice to or awareness of Colony Square of its improper conception and birth. That Order transferring title, after affirmance by the Atlanta District Court, was affirmed by the Eleventh Circuit's January 10, 1986 decision, which is, in part, the subject of this petition. Other orders and opinions were also the subject of improper *ex parte* communications between Judge Robinson and Prudential counsel leading to secret authorship thereof by Prudential attorneys. Included among these was the 21-page opinion denying Colony Square's first Motion for Disqualification.

On June 6, 1985, Colony Square filed a Motion for Disqualification and Other Relief in the Atlanta District Court. After discovery and a 4-day hearing, the Atlanta District Court, by Order of May 9, 1986 (120a), denied in its entirety Colony Square's Motion for Disqualification and Other Relief, despite the court's recognition that two key orders, including a 21-page opinion, were secretly authored in their entirety by Prudential counsel without notice to Colony Square. The District Court concluded that Prudential's attorneys acted improperly and disapproved of the manner in which the secretly authored orders were prepared, but nonetheless denied any relief to Colony Square.

Colony Square has noticed an appeal to the United States Court of Appeals for the Eleventh Circuit and intends to pursue all avenues of appellate relief with respect to the ethically suspect activities of the bankruptcy judge in Atlanta.

Court thus set the stage for transfer of title to the Leased Property *before* hearing any of Colony Square's defenses arising from Prudential's mismanagement. By Order of June 25, 1984 (44a) (the "Title Transfer Order"), the Atlanta Bankruptcy Court transferred title to the Leased Property from Colony Square to Prudential by a self-executing Order pursuant to Fed. R. Civ. P. 70. The Title Transfer Order also has been affirmed by the Atlanta District Court and the Eleventh Circuit, whose decision is the subject of this petition.

Before the Title Transfer Order, on April 30, 1984, L.R. Management, Inc., L.R. Property Management, Inc. and Loeb Capital Corporation ("Petitioning Creditors"), based on debts outstanding and unpaid since November 20, 1981, filed with the Pittsburgh Bankruptcy Court an Involuntary Petition for Relief Under Chapter 7 of the Bankruptcy Code,[6] thus triggering the automatic stay provisions of 11 U.S.C. § 362(a). The debts underlying the Involuntary Petition were incurred by Colony Square after the Chapter XII Plan had been established and implemented. The Petitioning Creditors were not parties to the Chapter XII case.

On June 23, 1984, Prudential filed a Motion for Issuance of Order in Aid of Jurisdiction with the Atlanta Bankruptcy Court. On the next day, June 24, 1984, Colony Square filed a Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction with the Pittsburgh Bankruptcy Court on the grounds that any effort by Prudential to obtain title would be in direct violation of the automatic stay provision of § 362(a) of the Code. In addition to its Title Transfer Order, on June 25, 1984, the Atlanta Bankruptcy Court issued an Order enjoining Colony Square, its partners, agents, attorneys, representatives and creditors from pursuing or enforcing their rights under the

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[6]On June 20, 1984, Colony Square, pursuant to 11 U.S.C. § 706(a), elected to convert the case to a reorganization proceeding under Chapter 11. Also on June 20, 1984, Colony Square filed a Chapter 11 Plan which provides for payment in full of all claims of its creditors, including Prudential.

Bankruptcy Code in any jurisdiction outside the Atlanta Bankruptcy Court with regard to the Leased Property and Prudential's claims (53a). Significantly, the Petitioning Creditors were enjoined even though the Chapter XII plan could not conceivably provide for their claims, which arose after the close of that proceeding. Review of the Eleventh Circuit's affirmance of the Atlanta Bankruptcy Court's June 25 injunction Order is sought here.

On June 27, 1984, the Pittsburgh Bankruptcy Court declined to issue a Temporary Restraining Order or a Preliminary Injunction on the grounds that the automatic stay of Section 362 of the Code provided adequate protection without superimposing an injunction. In its Order of the same day, the court reasoned from the central bankruptcy principles and statutory provisions articulated in this petition:

> This Court believes that a TRO or Preliminary Injunction Order would be redundant under these circumstances and that *11 U.S.C. § 362 is adequate to protect the Debtor's interests in property anywhere. 11 U.S.C. § 541 clearly creates an estate which includes all legal and equitable interests of the Debtor. The interest of the Debtor in the disputed real estate is such an interest.*

(93a-94a) (emphasis added).

B. The Judgments and Opinions Subject to Review

In its Opinion dated January 10, 1986, the Eleventh Circuit affirmed the decisions (i) transferring title to the Leased Property to Prudential and (ii) severing Colony Square's defenses grounded on Prudential's mismanagement from the question of title.

In its Opinion dated May 6, 1986, the Eleventh Circuit affirmed the decisions (i) dismissing Colony Square's first Chapter 11 case and (ii) enjoining Colony Square, its partners, agents, attorneys, representatives and creditors from litigating any and all matters concerning Colony Square, the Leased Property, the Chapter XII case and the Chapter 11 case in any

forum other than the Atlanta Bankruptcy Court or appeals taken therefrom.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Has Decided an Important Question Contrary To a Federal Statute and to Decisions of Other Circuits

For decades in this country, it has been a core principle of our national bankruptcy policy, embodied both in governing statutes and in case law, that debtors seeking bankruptcy relief are to be denied such relief "only when one or more *statutory* grounds of objection are proved." *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960) (emphasis added). The Eleventh Circuit has clearly repudiated this principle and instead held that a bankruptcy court, operating outside the scope of its congressionally granted authority, can deny a debtor access to relief as it sees fit. The result is that the national bankruptcy policy, as prescribed under both the Act and the Code, has been significantly altered by judicial fiat, creating uncertainty, confusion, and a conflict among the judicial circuits.

A. The Eleventh Circuit's Affirmance of the Atlanta Bankruptcy Court's Dismissal of the Chapter 11 Petition Contradicts the Six-Year Rule in Both the Code and the Act

Colony Square submits that the dismissal on jurisdictional grounds of its Chapter 11 petition arrogates to the federal judiciary powers constitutionally reserved to the legislative branch of government. The courts below have read into the governing statute—the Bankruptcy Code—an additional jurisdictional requirement, a reading that is contradicted by the statute itself.

The Code, 11 U.S.C. §§ 727(a), 1141(d), contains an express list of requirements that must be met before a discharge of indebtedness can be granted. (In so doing, the Code merely carries forward the import of Section 14c of the Act.) By accepted statutory construction, the provision of these express requirements implies the exclusion of all others. *See*,

e.g., Marshall v. Gibson's Products, Inc., 584 F.2d 668, 675 (5th Cir. 1978).[7] Section 727(a)(8) of the Code provides as follows:

> The Court shall grant the debtor a discharge, unless
>
> ...(8) The debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition.

The six-year rule in § 727(a)(8) demonstrates that Congress clearly envisioned that a prior petition leading to discharge filed more than six years before a subsequent petition by the same debtor would not bar the grant of a discharge in the second case.[8] Colony Square's 1975 Chapter XII petition (under the Act) did lead to discharge; its 1982 Chapter 11 petition (under the Code) was filed more than six years after the Chapter XII petition.

In considering the question of jurisdiction over the Chapter 11 proceeding commenced on January 28, 1982, Judge Robinson termed Colony Square's straightforward application of the statutory language to the operative facts "a sanitized interpretation." (70a). Judge Robinson thus indicated a policy

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[7]This principle is embodied in the ancient maxim, *expessio unius est exclusio alterius*. *See* 2A Sands, *Sutherland on Statutory Construction* § 47.24 (Rev.4th Ed. 1984)("[T]he expressio unius maxim ... is a product of 'logic and common sense.' It expresses the learning of common experience that when people say one thing they do not mean something else.")

[8]In fact, it is far from clear that any of the statutory restrictions on discharge applies directly to Colony Square as a Chapter 11 debtor. *See* Note, *Toward A Reform of the Six-Year Bar to Discharge in Bankruptcy* 97 Harv. L. Rev. 759, 769 (1984): ("[a] corporation can obtain repeated discharge in Chapter 11 without restrictions and without dissolving.") Section 727(a) has been held inapplicable to non-individual debtors under Chapter 11. *See International Ass'n of Machinists v. Airlift Int'l, Inc.*, 16 Bankr. 639, 640 (Bankr. S.D.Fla. 1981); *Delco Dev. Co. v. Kuempel Co.*, 14 Bankr. 324, 327 (Bankr. S.D. Ohio 1981). At the very least, however, compliance with the six-year rule ensures a non-individual debtor's right to file a second bankruptcy petition.

disagreement with congressional intent as evidenced by the plain language of the statute. It is respectfully submitted that this Court must not permit such reservations of a bankruptcy judge effectively to frustrate the legislative purpose of a statutory provision duly enacted by the United States Congress and signed into law by the President.[9]

Judge Robinson's March 23, 1984 Opinion is a telling example of an activist judicial response to legislation that a court finds discomforting:

> We hesitate to give the statute such a sanitized interpretation. Surely Congress did not contemplate a debtor's unfettered right to refile every six years, even if a bankruptcy case involving the same debt is still pending. As stated by the court in [*In re Stahl, Asano, Shigetomi Associates*, 7 Bankr. 181 (Bankr. D. Haw. 1980)],
>
> > "While the plain language of a statute is the best indication of legislative purpose, it is well settled that a court must look beyond the plain meaning of the statute if the plain meaning would lead to absurd or futile results." (70a)

Neither Judge Robinson nor either of the reviewing courts below stated *why* application of the statute's plain meaning leads to an absurd or futile result and *why* departure from that language is so necessary.

B. The Eleventh Circuit's Affirmance of the Atlanta Bankruptcy Court's Dismissal of the Chapter 11 Petition Is in Conflict with Decisions of Other Circuits.

Prudential and the lower courts would appear to accept as an article of faith that a bankruptcy court is entitled to reserve exclusive jurisdiction over a debtor for as long as it wishes and in as broad terms as it wishes. But this is not the law. As the

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[9]The kind of judicial legislating indulged in by Judge Robinson, and affirmed by the Eleventh Circuit, is particularly inappropriate in view of this Court's recent references to the "plain meaning rule" and its insistence on strict adherence to statutory language. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

leading commentator has emphatically observed, "the court lacks power to keep the reorganized enterprise in tutelage." 6A *Collier on Bankruptcy*, ¶ 11.20, at 315 (14th ed. 1977). Circuit Judge Jerome Frank, in an opinion joined by Circuit Judges Augustus Hand and Charles Clark, wrote that "Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . , have power to remain a wet-nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction." *In re Flatbush Ave.—Nevins St. Corp.*, 133 F.2d 760, 762 (2d Cir. 1943). In *Flatbush Ave.*, the Second Circuit panel was disturbed by judicial interference with conduct of the parties five years after the plan had been approved—precisely the period of time involved in the present case. There is little question that the Second Circuit, in reliance on *Flatbush Ave.*, would have decided the present case precisely contrary to the Eleventh Circuit's decision.

In his Opinion, Judge Cosetti of the Pittsburgh Bankruptcy Court, relying expressly on the Second Circuit's ruling in *Flatbush Ave.*, concluded "that a reorganization case under the Bankruptcy Act or a Chapter 11 case under the Bankruptcy Code cannot be under the filing Court's protection indefinitely." (105a) Indeed, in oral argument on Prudential's Motion to Dismiss the Chapter 11 case, counsel for Prudential conceded that "there comes a time when, as the debtor has said, jurisdiction of a bankruptcy court must end." (165a) With this concession a matter of record, the sole remaining issue is whether the point of expiration of retained jurisdiction is to be left to judicial fiat when Congress has expressly spoken on the issue. The conclusion is obvious: Courts must respect the six-year rule contained in both the Act and Code. The Second Circuit would agree with this proposition; the Eleventh Circuit disagreed below. As stated by the Second Circuit in *Clinton Trust Co. v. John H. Elliott Leather Co.*, 132 F.2d

299, 303 (2d Cir. 1942), a bankruptcy court's retained jurisdiction is "in reality only auxiliary to [jurisdiction over confirming a plan]," and is not sufficient "for control of the corporation indefinitely or for keeping it in tutelage to the court, so that the latter must pass upon its business activities."

Further, the Eleventh Circuit's decision is inconsistent with judgments of other courts.[10] The United States Court of Appeals for the Tenth Circuit has noted unequivocally, and in stark contrast to the decision under review, that it is a "well established rule . . . that . . . a bankrupt is not to be denied a discharge on general equitable principles *but only when one or more statutory grounds of objection are proved.*" *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960) (emphasis added).

The case of *In re Hale*, 274 F. Supp. 813 (W.D. Va. 1967), is instructive. There, a frustrated creditor argued that the bankrupt had been granted two previous discharges in bankruptcy on voluntary petitions and "that to grant a third discharge shortly after the expiration of the six-year period provided for in section 14, sub. c(5) would be 'highly inequitable' in that it would allow the bankrupt to evade the just debts of his creditors thereby 'perverting the very purpose of the Bankruptcy Act.'" *Id.* at 816. The court was not convinced. It noted that "[o]ne of the primary purposes of the bankruptcy statutes is to give the honest debtor the opportunity to reinstate himself in the business world by relieving him from the payment of his dischargeable debts," *id.*, and concluded:

> Congress having expressly provided that a bankrupt must wait six years before receiving further relief in another bankruptcy proceeding, the Court may not rewrite the statute on the basis of the equitable considerations advanced by the petitioner. It is a well established rule that a bankrupt is not to be denied a discharge on general

[10]Of course, the Eleventh Circuit's decision is directly contrary to Judge Cosetti's May 10, 1982 decision. (99a).

> equitable principles but only when one or more statutory grounds of objection are proved.

Id. When no such statutory grounds of objection are asserted, much less proved, it would appear *a fortiori* that a petition should not be dismissed.

The lower courts saw fit, by judicial fiat, to read into the Code and the Act a new rule—one that cannot be extracted from the language of the statutes—that limits the jurisdiction of a bankruptcy court to entertain a debtor's petition if that or another bankruptcy court has reserved jurisdiction over a previous bankruptcy plan, *no matter how long that plan has been in effect.* Other than § 403(a) of the Code (discussed *infra*), neither the courts below nor Prudential have indicated the statutory basis for the Atlanta Bankruptcy Court's authority to deny the debtor a right to file a petition under Chapter 11 in this case. No such authority exists. "If Congress in fact wishes to limit corporate redischarge, . . . it will have to say so, and not simply depend on the courts' undirected discretion to discern the 'spirit' of Chapter 11." Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 Harv. L. Rev. 759, 773 n.72 (1984).

Freshman v. Atkins, 269 U.S. 121 (1925), relied on with such certainty by the Atlanta Bankruptcy Court and the Atlanta District Court, is not to the contrary. Indeed, it should come as no surprise that the Court of Appeals failed to cite *Freshman* in either of its decisions for which review is sought. In *Freshman*, the debtor filed a voluntary petition and shortly thereafter applied for discharge. Discharge was contested and referred to a referee for a recommendation. The referee's report ultimately recommended that the Court deny discharge. Thereafter, there was no final action by the Court. *There was no discharge.* Over seven years after filing the first petition, the debtor filed a second voluntary petition. The Supreme Court held that failure to obtain discharge under the first proceeding barred an application for discharge under the second proceeding.

Clearly, such a factual situation is distinguishable from that of a mature, reorganized enterprise such as Colony Square, whose plan of arrangement had been judicially confirmed after a period of intensive negotiations and whose debts, operational features, composition, and array of creditors have changed substantially to reflect its business evolution subsequent to the first filing. In this case, unlike *Freshman*, the Chapter XII Court took final action. The Confirmation Order, paragraphs (c) and (d), expressly discharged Colony Square's debts other than the debt to Prudential. Thus, the underlying rationale of the *Freshman* holding is absent here. The facts are materially different. Indeed, even under the clearly distinguishable facts in *Freshman*, the court there did not dismiss the second petition on jurisdictional grounds; rather it assumed jurisdiction of the second case, and granted the debtor a discharge from all his debts that were not included in the first petition.[11]

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[11]Recent authority also supports Colony Square's position. In *Indiana National Bank v. Lones*, 50 Bankr. 801 (Bankr. W.D. Ky. 1985), the court was confronted with a debtor who filed multiple bankruptcies. The court permitted the second bankruptcy and discharged the debtor despite the plaintiff-creditor's objection that the debtor had waived his right to bankruptcy by reaffirmation. As one commentator has noted:

> [T]he decision in *Lones* illustrates that in order to avoid discharge of a reaffirmed debt in a subsequent case, a creditor should ask not only for reaffirmation but also for an agreement that the creditor may seek a determination from the court that the debt is nondischargeable. As a practical matter, this problem should not arise unless the payout period envisioned by the parties with respect to the reaffirmed debt exceeds the six-year period provided by Section 727(a)(8).

Bankruptcy Law Letter, December, 1985 at 8.

Colony Square and Prudential did not agree that Colony Square would not subject its debt to another bankruptcy proceeding after the expiration of the statutory six-year period. Like the debtor in *Lones*, Colony Square has a constitutionally founded right to seek the protection of the bankruptcy court, U.S. Const. art. I, § 8, cl. 4, and, like the debtor in *Lones*, Colony Square has never waived that right.

This Court should resolve the uncertainty in the lower courts surrounding the application of the six-year rule to repetitive bankruptcies by a single debtor and, in so doing, clarify the Court's decision in *Freshman.*

II. THE COURT OF APPEALS' DECISION UNDERMINES NATIONAL BANKRUPTCY POLICY BY FRACTURING THE UNITARY ESTATE OF THE DEBTOR AND BY VOIDING THE CODE'S AUTOMATIC STAY

The decisions under review contradict countless federal court decisions and all traditional understandings of bankruptcy law by fracturing the estate of the debtor between two bankruptcy proceedings. *See, e.g., Duggan v. Sansberry,* 327 U.S. 499, 511 (1946) (general policy of reorganization statute "that the entire administration of the estate should be centralized in a single reorganization court.") *Accord, e.g., In re Imperial "400" National, Inc.*, 429 F.2d 671, 677 (3d Cir. 1970). In explaining its decisions ultimately affirmed by the Court of Appeals, the Atlanta Bankruptcy Court, during oral argument on June 22, 1984, observed that

> this Court as a Chapter [XII] Court retained exclusive jurisdiction over this debt. That's not to say that there couldn't be another [Chapter 11] concerning other debts of Colony Square, in another Court. That Court would have jurisdiction over those debts, but this Court has exclusive jurisdiction over this particular debt . . . . (167a-168a)

In effect, by giving blind precedence to a bankruptcy court's retention of jurisdiction from an earlier proceeding, the lower courts have created a situation where pre-confirmation debts and post-confirmation debts are inevitably severed from one another into two proceedings—a result that is unwise, unmanageable, and unlawful.

A. **The Atlanta Bankruptcy Court Was Stayed from Proceeding in The Chapter XII Case by Application of the § 362 Automatic Stay of the Bankruptcy Code**

Section 362 of the Code provides that the filing of any petition for relief operates as a stay, applicable to all entities,

of adverse actions against the debtor or its property. The filing of the Chapter 11 petition and the involuntary Chapter 7 petition in Pittsburgh barred *any action* either by the Atlanta Bankruptcy Court or by Prudential outside those proceedings. Hence, a foreclosure action by Prudential subsequent to the filing of the Chapter 7 petition would be in direct violation of the automatic stay, *In re Murray*, 5 Bankr. 732 (D. Md. 1980), and any such action would be null and void. *In re Scott*, 24 Bankr. 738 (Bankr. M.D. Ala. 1982). Furthermore, any act to enforce or execute a judgment on the real estate would also violate the automatic stay under § 362(a)(2), (3). *E.g., In re Marcott*, 30 Bankr. 633, 636 (Bankr. W.D. Wis. 1983). It clearly does not matter that such a judgment was obtained in proceedings initiated before the filing of the petition. *In re Schwab*, 12 Bankr. 68, 71 (Bankr. D. Mass. 1981). Likewise, the *continuation* of the judicial proceeding in which permanent possession of the property has been sought would constitute a violation of the automatic stay. *See Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3d Cir. 1982); *In re Lewis*, 15 Bankr. 643 (Bankr. E.D. Pa. 1981). In short, Prudential's continuing efforts to enforce the Chapter XII Plan and the Atlanta Bankruptcy Court's Title Transfer Order purporting to transfer title to the Leased Property constitute a direct violation of the automatic stay.

The integrity and vitality of any bankruptcy proceeding are a function, pure and simple, of the protection afforded the debtor by the automatic bankruptcy stay. In stark contrast to this traditional understanding, the Eleventh Circuit has created a dangerous precedent under which creditor-lessees from earlier proceedings can declare open season on bankruptcy debtors. The Eleventh Circuit decision thus creates great uncertainty in federal bankruptcy law, an uncertainty that is this Court's peculiar function to resolve.

B. Fracturing the Estate of the Debtor Violates Congressional Intent as Embodied in the Plain Language of the Code

Congress has expressly declared in Section 541(a) of the Code that the commencement of a case under the Bankruptcy Code creates a bankruptcy estate "comprised of . . . *all* legal or equitable interests of the debtor in property as of the commencement of the case." (Emphasis added.) Nothing in the statute or its legislative history suggests that a bankruptcy court may abrogate Section 541(a) by reserving "exclusive" jurisdiction over specific assets of a debtor's estate. In fact, the law is clear that bankruptcy courts are creations of Congress with statutorily prescribed jurisdiction that must be respected unless it runs afoul of the Constitution. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The Eleventh Circuit's decisions under review, contrary to an abundance of statutory and decisional law, create a conundrum whereby the same debtor has assets and creditors simultaneously in two different courts. Nothing in the Bankruptcy Code equips the bankruptcy courts to deal with, and certainly nothing authorizes them to create, such a state of affairs. The Bankruptcy Code contemplates that all of a debtor's assets will be administered in a single forum. Thus, the filing of a petition for relief under the Code "creates an estate . . . comprised of all . . . legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). The court in which the case is filed is vested with "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of the estate." 28 U.S.C. § 1334(d). That court has the power and the duty to enforce the automatic stay under 11 U.S.C. § 362(a), which insulates all the property of the estate from the ravages and forays of "all entities," including other courts. *In re Critical Fork Coal Co.*, 18 Bankr. 422, 424 (Bankr. W.D. Va. 1982). Severing the bankruptcy estate in two squarely contradicts these statutory provisions and their

underlying unitary concept of the bankruptcy estate, and virtually guarantees procedural gridlock.

The proper procedure in this case, and others like it, would have been to allow the Pittsburgh Bankruptcy Court to determine for itself whether it has jurisdiction over the involuntary Chapter 7 Petition. *See In re Visioneering Construction, Inc.*, 661 F.2d 119, 122 (9th Cir. 1981) (noting the bankruptcy court's authority in the first instance to determine its own jurisdiction). By the same token, any questions concerning the scope of the automatic stay are best left to the bankruptcy court in which the debtor's case is pending. *See In re Baldwin-United Corp. Litigation*, 765 F.2d 343 (2d Cir. 1985). The Bankruptcy Code provides orderly procedures for both relief from and termination of the automatic stay. 11 U.S.C. § 362 (b), (d). Such procedures are to be followed no matter how pressing or how clear a creditor's right to the debtor's property appears to be. *In re Motley*, 10 Bankr. 141, 144 (Bankr. M.D. Ga. 1981). Thus, until such time Prudential seeks and receives relief from the stay triggered by the filing of the involuntary Chapter 7 Petition, the Atlanta Bankruptcy Court has no jurisdiction to act at all, and hence any action it purported to take, including those under review here, is void *ab initio*. Instead, by issuance of its Title Transfer Order, the Atlanta Bankruptcy Court, in an unseemly rush to judgment, usurped the jurisdiction of the Pittsburgh Bankruptcy Court and blithely ignored the congressionally established procedures for relief from the automatic stay.

Indeed, even more remarkably, after the unsecured creditors filed the involuntary Chapter 7 proceeding, the Atlanta Bankruptcy Court entered an injunction prohibiting them from seeking congressionally prescribed remedies in that proceeding, even though their debts arose after confirmation of the Plan in 1977. (53a) The same injunction prohibited the debtor and all other creditors from seeking relief in the new proceeding. By affirming this action (1a), the Eleventh Circuit further undermined the national bankruptcy policy's goal of

creating a unitary estate of the debtor pursuant to the filing of a petition for relief under the Code.

III. THE COURT OF APPEALS HAS CONSTRUED THE CODE'S TRANSITIONAL PROVISION CONTRARY TO ITS PLAIN MEANING AND HAS MISTAKENLY APPLIED, AND DANGEROUSLY EXTENDED, A DECISION OF THIS COURT

The courts below relied on the argument that § 403(a) of the Code forecloses Colony Square from eligibility for relief under the Bankruptcy Code. The manifest purpose of this provision is to prohibit application of the substantive provisions of the Code to pending cases brought under the Act. Colony Square has no quarrel with this common sense proposition.

The courts below gave § 403(a) a far broader reading, however, and ruled that this transitional provision prevented Colony Square from filing its Chapter 11 Petition. This reading of § 403(a) is a gross distortion of legislative intent. The enactment of the Code in 1978, after the Plan had been confirmed and before Colony Square had filed its petition for relief under Chapter 11, is a purely fortuitous circumstance in this case. Colony Square's arguments do not depend on any feature peculiar to the Code as opposed to the Act. As noted above, the six-year rule existed under the Act and was carried forward intact from the Act to the Code.[12] This case would be in exactly the same posture today if the Code had never been enacted or if it had been enacted ten years earlier. As it happened, Colony Square was obliged to file for relief under the Code because the Act was no longer in effect. If the Code had not been enacted, a filing under the Act would have presented precisely the same issues and would have been just as viable.

Colony Square's 1982 Chapter 11 filing, more than six years after the 1975 Chapter XII petition, was neither unforeseeable nor unfair to Prudential. Prudential proposed and

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[12]The Legislative History expressly recognizes this. *See* S.Rep. No. 989, 95th Cong., 2d Sess. 99 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 385 (1977); *see also* Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 Harv. L. Rev. 759, 762 (1984).

drafted the Plan which included a moratorium period extending beyond six years of the Chapter XII filing. Thus, Prudential knew in 1977 that Colony Square could do in 1982 exactly what it in fact did—make a second filing. Nothing in the Act would have prevented this. To hold that § 403(a) precludes a second filing is to attribute to Congress an intent to diminish the rights of debtors who have the bad luck to be caught in the transition period between the Act the the Code. Congress intended no such thing.

The lower courts mistakenly relied on *Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354 (1982), a three-page *per curiam* opinion of this Court that addresses an issue dealt with by numerous lower courts under § 403(a) of the Code: What is the proper judicial response to a situation in which an entity in rapid-fire succession files two bankruptcy petitions; the first such petition was filed under the Act, and the entitlement to file the second petition arose *only* because of the fortuitous enactment of the Code? Almost uniformly courts have held that such ploys are not to be countenanced under § 403(a).

Geiger, however, is not applicable to the facts of Colony Square's Chapter 11 proceeding. In *Geiger*, a debtor filed a petition under Chapter XI of the Act *a scant six weeks* before the Code became effective. Shortly after the new statute's effective date, and less than five months after its first petition under the Act, the debtor moved to dismiss its proceeding under the Act so that it could file a new case under Chapter 11 of the Code. This Court apparently perceived this as an attempt to superimpose the substantive provisions of the Code (which were apparently more to the liking of the debtor) on to an existing Chapter XI case. Nothing of the sort has happened here. Colony Square has not sought to "refile" its Chapter XII petition. Rather, it seeks to put the old case entirely behind it and to exercise its right under the six-year rule in an entirely new proceeding. In contrast to the apparent efforts to exploit the new Code in *Geiger*, the present proceeding involves an already reorganized enterprise *which could*

have filed a new petition under the Act even if the Code had not been enacted. Thus § 403(a) of the Code simply has no relevance to this case. Colony Square's bankruptcy rights do not turn on any unique new benefit conferred on debtors under the Bankruptcy Code. Colony Square would be following exactly the same course if the Code had never been enacted.[13]

The Court of Appeals' mistaken reliance on *Geiger* amply demonstrates the confusion generated by that case and the singular need for clarification that can only be supplied by this Court. As Justice Stevens, joined by Justice Marshall, noted in his *Geiger* dissent, even under the facially suspicious facts present in *Geiger*, the majority's interpretation of § 403(a) was "inflexible" and likely to lead to results not within congressional contemplation at the time of the statute's enactment. 454 U.S. at 363. The decisions under review confirm this prediction. It is respectfully submitted that, as an alternative to this Court's limiting *Geiger* strictly to its facts, it may wish flatly to overrule the case as a clear detriment to federal bankruptcy practice.

Colony Square urges this Court to review the § 403(a) rationale of the Court of Appeals' decision and, at the very least, to limit *Geiger* to the scope of *this* Court's original decision. The lower courts have set a dangerous precedent for the future application of statutory provisions, like § 403(a), that prescribe the transition from one statutory scheme to its replacement. The need for legislative reform is certain to generate many transitions similar to the one from the Act to the Code. The constantly shifting legislative panorama requires

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[13]Judge Cosetti clearly recognized this in his May 10, 1982 Opinion (102a-103a):

> This Court agrees with the Debtor that on these facts this section [403(a)] is not applicable here. The section is applicable to a situation where a case was filed prior to the passage of the Bankruptcy Reform Act and the Debtor seeks to convert his case from one under the Act to one under the Code. *See* [*Geiger*]. In *Geiger* the six years had not passed. CSC argues that it could have filed a new case under the Bankruptcy Act and that it is not prohibited by the Code from doing so. The Geiger rationale is not applicable.

this Court's firm guidance. Colony Square submits that the lower courts' improper application of § 403(a), read in isolation from the Act and the Code, is an evasion of their responsibility to effectuate the purpose of the substantive statutes and of the transitional provision itself. The pressure on the judiciary to seize upon transitional provisions to dodge thorny questions in the body of the statutes is great; this Court must ensure that the judiciary does not bow to such pressure, thereby compounding the unpredictability and the perceived unfairness of the constant and rapid change in substantive law.

IV. The Court of Appeals' Affirmance of the Atlanta Bankruptcy Court's Severance of Colony Square's Defenses to the Transfer of the Leased Property Deprived Colony Square of Due Process and Conflicts With the Bankruptcy Law Decision of Another Circuit

The Court of Appeals perceived the burden to be on Colony Square to disprove the proposition that the promise and duty of Prudential to manage the Leased Property in accordance with the Plan and the Lease are independent of its right to obtain title to the Leased Property upon Colony Square's nonpayment of debt. However, the imposition of such a burden is clearly at odds with established contract law. The settled rule is that promises are not to be construed as independent. *See Restatement (Second) of Contracts* § 232 (1979).

This Court does not sit to review federal court determinations of state contract law, no matter how wrongheaded. However, the Constitution, art. 1, § 8, cl. 4, grants Congress the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." The idiosyncracies of local law cannot be permitted to frustrate national bankruptcy policy. *In re Colonial Realty Investment Co.*, 516 F.2d 154 (1st Cir. 1975). *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (Implementation of national labor policy requires judicial development of federal substantive law.)

The Plan established a format of relationships widely employed in federal bankruptcy law; it is an integrated document that created a complex network of duties and relations between Prudential, as creditor, and Colony Square, as debtor, with the result that issues relating to Colony Square's compliance with the Plan are inextricably intertwined with, dependent upon, and logically follow Prudential's own compliance with the Plan. The Court of Appeals' interpretation of the Plan fails to take into account the commercial realities of this situation, which are replicated in bankruptcy courts across the country. Colony Square, like other bankruptcy debtors, never would have consented to the terms of the Lease had it not received the benefits of the Moratorium Agreement and the expected rents and profits from Prudential's management of the Leased Property. It is equally clear that Prudential would not have granted Colony Square a moratorium had it not been given possession of the Leased Property through the Lease. Judicial administration of the national bankruptcy policy will be obstructed by the Eleventh Circuit's decision severing the debtor's defenses, as the practical result of that decision is to permit lender-lessees to declare open season on debtors irrespective of the congressional goal of debtor rehabilitation. As a result, debtors are likely to contest bitterly the imposition of any arrangements similar to those contained in the Plan.

The Court of Appeals' opinion also fails to take into account another principle of contract law that permeates federal bankruptcy practice—that one party may not prevent or hinder another party's performance and take advantage of that failure to perform. *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1371 (5th Cir. 1979). This principle, also known as the prevention doctrine, is a staple of bankruptcy practice and recently was applied in a bankruptcy context by the United States Court of Appeals for the Eighth Circuit in *Stevenson v. Stevenson Associates*, 777 F.2d 415 (8th Cir. 1985). There, in facts analogous to those presented here, the Eighth Circuit would

not permit a party to gain from its own wrongdoing, as Prudential has here, through summary dismissal of a plaintiff's claim.

Moreover, Colony Square was not permitted to adduce evidence on the intent of the parties relating to the interdependence of their respective promises in the key Plan documents. The right of a litigant to be heard has been characterized as "one of the fundamental rights of due process of law." *Council of Federated Organizations v. Mize*, 339 F.2d 898, 901 (5th Cir. 1964). The right to hearing is "the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify by-passing that right." *Harmon v. Superior Court*, 307 F.2d 796, 798 (9th Cir. 1962). Here, Bankruptcy Judge Robinson refused even to receive Colony Square's proffer of evidence regarding the intent of the parties. Clearly, Colony Square has been deprived of this fundamental right in the Atlanta Bankruptcy Court.

The lower courts rejected Colony Square's claims solely on their reading of the documents. As was noted in *Stevenson*, 777 F.2d at 418:

> Judgment as a matter of law based solely on the effect of statutory or contract provisions, like summary judgment, may be entered only when it is clear that the truth is known and that there are no disputed material issues of fact requiring resolution by evidentiary hearing.

Colony Square urges this Court to review the Eleventh Circuit's decision so that it may resolve a conflict among the circuits regarding application of the prevention doctrine to relationships commonly found in federal bankruptcy situations. Further, Colony Square urges this Court to review the severance issue in order to have before it all issues implicated by the jurisdictional questions addressed earlier in this petition.

CONCLUSION

For these various reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1985

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, *Petitioner,*

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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In re
COLONY SQUARE COMPANY, a Georgia Limited Partnership, Debtor.

COLONY SQUARE COMPANY,
Plaintiff-Appellant,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
et al., Defendants-Appellees, (Two Cases).

Nos. 85-8568, 85-8569.

United States Court of Appeals,
Eleventh Circuit.

May 6, 1986.

The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., enjoined debtor for commencing or continuing reorganization proceedings affecting its property, from seeking to cite creditor or its legal counsel for contempt, or from otherwise taking any action against creditor and its counsel in proceeding in bankruptcy court, and affirmed bankruptcy court's dismissal of debtor's voluntary Chapter 11 case. On appeal, the Court of Appeals held that: (1) the bankruptcy court had power to enjoin the debtor from filing actions that touched on the subject property during the pendency of Chapter XII appeal, and (2) district court properly affirmed dismissal of Chapter 11 case.

Affirmed.

1. Bankruptcy •1003

Bankruptcy court had power, in aid of its jurisdiction, to enjoin debtor from filing actions that touched on subject property during pendency of Chapter XII appeal; thus, district court properly enjoined debtor from commencing

or continuing reorganization proceedings affecting its property, from seeking to cite creditor or its legal counsel for contempt, or from otherwise taking any action against creditor and its counsel for proceeding in bankruptcy court. Bankr.Code, 11 U.S.C.A. §§ 101 et seq., 362, 403; Bankr.Act, §§ 1 et seq., 401 et seq., as amended, 11 U.S.C.(1976 Ed.) §§ 101 et seq., 801 et seq.

2. Bankruptcy ⋆662

Power of bankruptcy court, which had exclusive jurisdiction, to act was not stayed by pendency of case in district court, and thus, bankruptcy court properly dismissed Chapter 11 case transferred from district court. Bankr.Code, 11 U.S.C.A. § 1101 et seq.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and HATCHETT, Circuit Judges, and DUMBAULD,* Senior District Judge.

PER CURIAM:

These two bankruptcy appeals involve Colony Square Company (Colony Square) as debtor and the Prudential Insurance Company of America (Prudential) as creditor. *In re Colony Square Company*, 779 F.2d 658 (11th Cir.1986) reports the essential facts.

In *Colony Square*, we held that the automatic stay provision of section 362 of the Bankruptcy Reform Act of 1978, codified at 11 U.S.C. § 101 *et seq.*, did not prevent the Atlanta bankruptcy court from enforcing the terms of a Chapter XII bankrupcy case while a new case involving the same debtor, Colony Square, was pending in the Pittsburgh bankruptcy court. We based our holding on *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354, 102 S.Ct. 695, 70 L.Ed.2d 542 (1982), in which the

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*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvnaia, sitting by designation.

Supreme Court held that Title 11 U.S.C. § 403 precludes application of the Reform Act to cases commenced under the former Bankruptcy Act of 1898. We also based our holding on the Atlanta bankruptcy court's retention of exclusive jurisdiction over the Chapter XII plan, the property, and the parties. *Colony Square*, 779 F.2d at 655.

Colony Square now appeals two related matters in which the Atlanta bankruptcy court sought to protect its jurisdiction. The district court affirmed the bankruptcy court's actions. We affirm.

I.

In 85-8569, the Atlanta bankruptcy court enjoined Colony Square, its partners, agents, attorneys, representatives, and creditors from commencing or continuing reorganization proceedings affecting the Colony Square property. The bankruptcy court also enjoined Colony Square from seeking to cite Prudential or its legal counsel for contempt, or otherwise taking any action against Prudential and its counsel for proceeding in the Atlanta bankruptcy court.

[1] The sole question before us in 85-8569 is whether the district court was correct in holding that the bankruptcy court did not abuse its discretion when it enjoined Colony Square. We hold that the district court did not err. The district court correctly concluded that the Atlanta bankruptcy court has the power, in aid of its jurisdiction, to enjoin Colony Square from filing actions that touch on the subject property during the pendency of the Chapter XII appeal. *See In the Matter of Macon Uplands Venture v. Metropolitan Life Insurance Co.*, 624 F.2d 26 (5th Cir.1980).

Colony Square contends that, by enjoining creditors of Colony Square, the district court issued an overbroad order; because no creditor of Colony Square is challenging the order in this court, we do not consider this contention.

II.

In 85-8568, the Atlanta bankruptcy court dismisssed Colony Square's Chapter 11 case that the Pittsburgh district court transferred to the Atlanta bankruptcy court. This appeal is similar to *Colony Square*; in that appeal, Colony Square objected to the Atlanta bankruptcy court's exercise of jurisdiction in the Chapter XII case because of the pendency of a petition converted by Colony Square from Chapter 7 to Chapter 11 in the Pittsburgh bankruptcy court.

[2] The sole issue is whether the district court erred in affirming the Atlanta bankruptcy court's dismissal of Colony Square's voluntary Chapter 11 case. Our holding in *Colony Square*, 779 F.2d at 665, that, because the Atlanta bankruptcy court had exclusive jurisdiction, its power to act was not stayed by the pendency of the case in Pittsburgh compels our holding that the district court properly affirmed the dismissal of the Pittsburgh Chapter 11 case.

III.

These appeals restate the issues decided in *Colony Square.*

We hold that the district court properly enjoined Colony Square from commencing or continuing reorganization proceedings affecting the Colony Square property, from seeking to cite Prudential or its legal counsel for contempt, or from otherwise taking any action against Prudential and its counsel for proceeding in the Atlanta bankruptcy court. We also hold that the Atlanta bankruptcy court properly dismissed the Chapter 11 case transferred from the Pittsburgh district court.

We affirm the district court in both cases.

AFFIRMED.

In re
COLONY SQUARE COMPANY, Debtor.

COLONY SQUARE COMPANY, a Georgia
Limited Partnership,
Plaintiff-Appellant,

v.

PRUDENTIAL INSURANCE COMPANY
OF AMERICA, Defendant-Appellee.

No. 85-8216.

United States Court of Appeals,
Eleventh Circuit.

Jan. 10, 1986.
Rehearing and Rehearing En Banc
Denied March 14, 1986.

Principal secured creditor filed motion seeking debtor's compliance with a Chapter XII bankruptcy reorganizational plan. The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., affirmed an order of the Bankruptcy Court enforcing the plan, and debtor appealed. The Court of Appeals held that: (1) automatic stay provision of Bankruptcy Code had no effect on creditor's action to enforce reorganizational plan commenced under former Bankruptcy Act of 1898, and (2) debtor could not assert defense of willful and negligent mismanagement against creditor in connection with creditor's action to enforce the plan but, instead, had to assert such a claim in a separate action.

Affirmed.

1. Bankruptcy •217.3(4)

Automatic stay had no effect on principal secured creditor's action to enforce reorganizational plan commenced under former Bankr.Act, § 401 et seq., 11 U.S.C.

(1976 Ed.) § 801 et seq. Bankr.Code, 11 U.S.C.A. §§ 362, 403, note prec. § 101.

2. Bankruptcy ⋆676.10(1)

Debtor could not assert defense of willful and negligent mismanagement against principal secured creditor in connection with creditor's action to enforce debtor's Chapter XII bankruptcy reorganizational plan but, instead, had to assert such a claim in a separate action against creditor, where language of plan, order confirming plan, and lease and moratorium agreement between debtor and creditor gave no indication that creditor's remedies under moratorium agreement were depending upon quality of its management under the lease. Bankr.Act, § 401 et seq., 11 U.S.C. (1976 Ed.) § 801 et seq.

Kenneth A. Shapiro, Atlanta, Ga., Thomas R. Johnson, Kirkpatrick & Lockhart, Pittsburgh, Pa., for plaintiff-appellant.

Frank M. Bird, Jr., Richard Neal Batson, Grant T. Stein, Kim E. Anderson, Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Circuit Judge.

PER CURIAM:

As part of Colony Square Company's Chapter XII bankruptcy reorganizational plan of March 30, 1977, its principal secured creditor, Prudential Insurance Company, leased the Colony Square Complex. The Bankruptcy Court

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*Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

for the Northern District of Georgia in Atlanta retained jurisdiction. When Colony Square failed to make cash contributions to Prudential Insurance Company, as required by a Moratorium Agreement entered into concurrently with the lease, Prudential, on January 8, 1982, gave Colony Square notice that it intended to exercise its option under the Agreement to acquire title to the property and thereby extinguish the indebtedness owed to Prudential. On January 28, 1982, one day before Prudential and Colony Square were scheduled to sign debt-cancellation documents, Colony Square filed a Chapter 11 case in the Bankruptcy Court for the Western District of Pennsylvania in Pittsburgh. That action was transferred to the Atlanta bankruptcy court. Thereafter, on April 30, 1984 an involuntary Chapter 7 petition was filed against Colony Square in the Western District of Pennsylvania. Colony Square had that action converted into a Chapter 11 proceeding, which as of the date of oral arguments for this appeal, was still pending in the Pittsburgh court.

While the two Chapter 11 actions were proceeding, one in Georgia, the other in Pennsylvania, Prudential, on February 9, 1984, filed a motion in the Atlanta bankruptcy court seeking Colony Square's compliance with the March 30, 1977 reorganizational plan. Colony Square responded by asserting first, that Prudential had mismanaged the property, and second, that the automatic stay provision of section 362 of the Bankruptcy Reform Act of 1978, codified at 11 U.S.C., precluded the Atlanta bankruptcy court from proceeding with the case because the second Chapter 11 action was pending in the Pittsburgh bankruptcy court.

On May 14, 1984, the Atlanta bankruptcy court denied Colony Square's attempt to assert affirmative defenses concerning mismanagement of the property and imputing bad faith against Prudential in connection with Prudential's motion to enforce the plan. On June 25, 1984, after a hearing, the bankruptcy court entered an order

enforcing the plan, holding that section 362 had no effect on the proceedings. The district court on April 2, 1985 entered an order affirming these May 14, 1984 and June 25, 1984 orders of the bankruptcy court. We affirm.

There is no need to prepare an extensive opinion. The affirmance is based on the appropriate reasoning of both the bankruptcy court and the district court. Although we have been asked to stay our decision pending further proceedings in the trial court, this request is denied.

[1] This case presents two issues, the first of which is whether the automatic stay provision of section 362 prevented the Atlanta bankruptcy court from enforcing the plan while the Pittsburgh bankruptcy case was still pending. We hold that the stay provision had no effect on Prudential's action to enforce the March 30, 1977 plan, which was commenced under the former Bankruptcy Act of 1898.

The district court correctly held that section 403, the savings provision of the Bankruptcy Reform Act of 1978, precludes the application of the Reform Act to cases commenced under the former Bankruptcy Act of 1898. *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354, 102 S.Ct. 695, 70 L.Ed.2d 542 (1982). The Supreme Court there interpreted section 403(a) as a transitional rule enacted by Congress to govern cases pending under the former Bankruptcy Act on the effective date of the Reform Act. The Court gave a literal interpretation to the section as follows:

> The language of § 403(a) is unequivocal. It provides that cases filed under the Bankruptcy Act '*shall* be conducted and determined under such Act as if [the New Code] had not been enacted.'

Id. at 357, 102 S.Ct. at 696. The Court also relied on Congressional intent:

> The first phase of transition begins on October 1, [1979], the primary effective date of the bill. On that date, the new substantive law of bankruptcy as proposed by the bill will be put into effect. It will apply to all cases commenced on or after October 1, [1979]. The application of the new law will only be to new cases, however. Cases commenced before October 1, [1979], will continue to be governed by the Bankruptcy Act, as in effect September 30, [1979], and by all other applicable laws in effect on that date. Those cases will proceed as though this bill had not been enacted.

Id. at 357 n. 1, 102 S.Ct. at 697 n. 1 (quoting H.R.Rep. No. 95-595, at 287-88 (1977)).

This decision, together with the Atlanta bankruptcy court's express retention of exclusive jurisdiction over the Chapter XII plan, the property, and the parties, sustains the district court's decision that the automatic stay provision of section 362 did not prevent the Atlanta bankruptcy court from enforcing the March 30, 1977 plan.

[2] The second issue is whether the district court properly held that Colony Square could not assert a defense of willful and negligent mismanagement against Prudential in connection with Prudential's action to enforce the plan. We hold the district court properly determined that Colony Square would have to assert such a claim in a separate action.

The decision turns on the intent of the parties. In its decision, the district court looked to whether the parties intended proper management to be a prerequisite to Colony Square's duty to pay the loan. The court found that under the lease and Moratorium Agreement, the covenant made by Colony Square to pay the loan in full by January

1, 1982 was separate and distinct from Prudential's covenant regarding the management of the property under the lease.

The language of the March 30, 1977 Order, the plan, the lease, and the Moratorium Agreement gives no indication that Prudential's remedies under the Moratorium Agreement were dependent upon the quality of its management under the lease. The only condition precedent to the exercise of Prudential's right to foreclose upon the property was default by Colony Square. The district court did not err in sustaining the bankruptcy court's severance of Colony Square's mismanagement claim from Prudential's action to enforce the plan.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership

C84-1109A

JUN 28 1985

LUTHER D. THOMAS, Clerk

ORDER

On March 26, 1984, Judge Hugh Robinson, Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of Georgia dismissed a Chapter 11 petition which had been filed by Colony Square Company ("CSC") in 1982 in the bankruptcy court of Pennsylvania. CSC appeals the order of March 26, 1984. The issue on appeal is whether Judge Robinson erred in dismissing this Chapter 11 case for lack of subject matter jurisdiction.

II. Factual Background

On October 16, 1975, CSC filed a voluntary petition under Chapter XII of the Bankruptcy Act of 1898 (formerly 11 U.S.C. § 701 *et seq.*) (the "Act"). In an order dated March 30, 1977, the bankruptcy court confirmed the Chapter XII Plan for CSC which had been proposed by the Prudential Insurance Company, the principal secured creditor of CSC, and consented to by CSC. The March 30 order discharged the indebtedness of CSC, except for its indebtedness to Prudential. CSC has continued its business under the Plan since the date of confirmation. The Plan included a Lease Agreement that provided that CSC would continue

its ownership of the Colony Square Complex (the "Property"), with Prudential, as lessee, responsible for its management. Under the terms of the Lease, Prudential was to take possession of and operate the Property for a period initially ending December 31, 1981. Each year CSC's debt to Prudential would be reduced by "net cash flow" (defined in the Lease), and CSC would either bring the debt current or would refinance its debt with another lender. CSC also had the right to terminate the Lease prior to December 1981, by paying Prudential's entire debt or by bringing Prudential's debt current. In addition, CSC would be obligated to reimburse Prudential for its outlay, an amount in excess of $5 million, which was required to fund the Chapter XII Plan, as well as to pay for capital and leasehold improvements made to the Property during Prudential's term of possession and management. The Lease also required Prudential to provide CSC with audited financial statements for the property and other information.

Pursuant to the terms of the Moratorium Agreement which was entered into concurrently with the Lease, Prudential's right to enforce its claim on CSC's indebtedness was postponed for the duration of the Lease, provided that CSC made certain cash contributions to the operations of the Property on an annual basis. The Moratorium Agreement provided that prior to January 1, 1982, CSC had no obligation to make payments of principal on account of its indebtedness to Prudential, except to the extent of the rental payments received from Prudential under the Lease. The Moratorium Agreement also provided that the unpaid balance on CSC's indebtedness, with interest, was due on January 1, 1982, if CSC did not bring its indebtedness to Prudential current prior to that date. If CSC did not perform its obligations and exercise its right to terminate the Lease by paying Prudential in full or bringing Prudential current, and making the extra reimbursement payments, Prudential could then exercise its remedies. One of the

remedies contained in the Moratorium Agreement gave Prudential the option to purchase the Property (in lieu of foreclosure) in exchange for cancellation of CSC's indebtedness to Prudential. If this option was chosen, Prudential was also granted the right to purchase the name "Colony Square."

The March 30 confirmation order also provided that the Atlanta bankruptcy court would retain exclusive jurisdiction over the rights and obligations of the parties with respect to the Chapter XII Plan:

> This Court shall retain jurisdiction to enforce this order and the Plan . . .this Court shall, as provided in the Plan, retain exclusive jurisdiction of the Debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto.

Order of March 30, 1977 at ¶ (f), pp. 7-8. The Chapter XII Plan also specifically provided that jurisdiction over the proceeding would be retained by the bankruptcy court:

> Following confirmation, the Court will (i) retain jurisdiction to supervise the effectuation of this plan and to issue ancillary orders as may be necessary in connection therewith, and (ii) retain exclusive jurisdiction over the Remaining Property to supervise and enforce the compliance by CSC and Prudential with respect to any of the Remaining Property. Except for matters described in clause (ii) above, the Court will not exercise continuing jurisdiction over the Remaining Property after Final Confirmation.

Chapter XII Plan at ¶ (2), p. 15.

CSC failed to make its cash contribution during 1981, and also failed to pay Prudential in full or bring the debt current. Prudential accelerated its debt by notice to CSC dated December 14, 1981. This acceleration was subject to

CSC's right to redeem. On January 8, 1982, Prudential gave CSC notice that it would exercise its option to acquire a deed in lieu of foreclosure and purchase the name "Colony Square." January 29, 1982 was set as the date for tender of the debt-cancellation documents.

On January 28, 1982, CSC filed a Chapter 11 case under Title 11, United States Code, as amended by the Bankruptcy Reform Act of 1978 (the "Code"), 11 U.S.C. § 101 *et seq.* This action was filed in the Bankruptcy Court for the Western District of Pennsylvania (the "Pittsburgh bankruptcy court"). The transfer of title to the Property from CSC to Prudential, scheduled for January 29, never took place.

Prudential moved to dismiss the Chapter 11 case in Pittsburgh. The Pittsburgh bankruptcy court denied the motion in May 1982, finding, *inter alia*, that it had jurisdiction over CSC's Chapter 11 petition, that the petition was timely filed in good faith, and that abstention was not proper under either 11 U.S.C. § 305 or 28 U.S.C. § 1471. *In re Colony Square Co.*, 22 B.R. 92 (Bankr. W.D. Pa. 1982).

Prudential appealed this order of the Pittsburgh bankruptcy court. In April 1983, the United States District Court for the Western District of Pennsylvania reversed the Pittsburgh bankruptcy court and remanded the action with instrucitons to transfer the part of the proceeding involving CSC's debt to Prudential to the bankruptcy court in Atlanta, pursuant to 28 U.S.C. § 1475, for the purpose of ruling on Prudential's motion to dismiss. Subsequently, the district court in Pittsburgh withdrew the reference of the case to the Pittsburgh bankruptcy court, and in November 1983, transferred the Chapter 11 case to this court. By an order entered February 2, 1984, this court referred the Chapter 11 case to the bankruptcy court in Atlanta. On March 26, 1984, the bankruptcy court, per

Judge Robinson, dismissed the Chapter 11 case. This order is the subject of the instant appeal.

On April 2, 1985, this court affirmed the bankruptcy court's order of June 25,1984, which enforced the plan of arrangement confirmed in the Chapter XII plan. This court found that section 403(a) of the Code and the retention of jurisdiction by the Atlanta bankruptcy court over the relationship between Prudential and CSC evolving from the confirmed plan in the Chapter XII case, required that section 362 of the Code have no force and effect as to Prudential, CSC, and the Atlanta bankruptcy court. *See In Re Colony Square*, Civil Action No. C84-1793A (N.D. Ga. April 2, 1985).

After careful consideration of the bankruptcy court's decision below and the parties' briefs filed in this appeal, the court finds that the bankruptcy court correctly dismissed the Chapter 11 petition for lack of subject matter jurisdiction. In the order of April 2, this court rejected CSC's contention that the Chapter 11 petition triggered an automatic stay under section 362 which prevented the Atlanta bankruptcy court from enforcing the Chapter XII Plan. The court now finds that the Chapter 11 petition must be dismissed because CSC attempted to include within that petition debts and property which were already within the jurisdiction of the Chapter XII bankruptcy court. This finding is compelled by *Freshman v. Atkins*, 269 U.S. 121, 46 S.Ct. 41 (1925), and by section 403(a) of the Code.

In *Freshman v. Atkins*, the Supreme Court ruled that a bankruptcy court could refuse to accept an application for discharge from debt when an earlier application concerning the same debt was still pending in the court. Relying on *Freshman v. Atkins*, Judge Robinson held that the issue of the Prudential debt had been resolved during the on-going Chapter XII proceedings and that CSC was bound by the

terms of the agreements which it had entered into in the course of those proceedings. Judge Robinson found that by filing the Chapter 11 petition, CSC was attempting to thwart the operation of the unconsummated Chapter XII Plan and to relitigate the question of how the Prudential debt should be handled in the bankruptcy proceedings. Because the Chapter XII bankruptcy court had retained jurisdiction to enforce the confirmed Chapter XII plan, Judge Robinson concluded the Chapter 11 proceeding had to be dismissed for lack of jurisdiction.

The dismissal of the Chapter 11 petition is also consistent with section 403(a) of the Code, which provides:

> A case commenced under the Bankruptcy act, and all matters and proceedings in or relating to any such case shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of the parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter or proceeding as if the Act had not been enacted.

In the order of April 2, 1985, this court held that, pursuant to section 403(a), the filing of the Chapter 11 petition had no effect on the Chapter XII case or on the bankruptcy court's power to order enforcement of the confirmed Plan. The court now finds that the Chapter 11 case must be dismissed for lack of subject matter jurisdiction because the Chapter XII court has retained exclusive jurisdiction over the Prudential debt, the Colony Square property, the relationship of Prudential and CSC with regard to the debt and the property. Under the terms of section 403(a), the on-going Chapter XII proceeding continues as if the new Act had never been enacted, and thus the filing of a Chapter 11 petition which attempts to assert jurisdiction over the same debt does not operate to divest the Chapter XII

court of its exclusive and continuing jurisdiction over the debt.

The court also rejects CSC's argument that the Chapter 11 case can be maintained by virtue of section 14(c)(5) of the Act, 11 U.S.C. § 32(c)(5). This section provides, in relevant part, that:

> [T]he Court shall grant the discharge unless satisified that the bankrupt . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy has been granted a discharge or had a composition or an arrangement by way of a composition or a wage earners plan by way of composition confirmed under this title.

Judge Robinson found that in enacting this section, Congress did not contemplate providing a debtor with the unfettered right to refile a bankruptcy petition every six years if a bankruptcy case involving the same debt was still pending. This court agrees with Judge Robinson's interpretation of section 14(c)(5). The court does not believe that Congress intended that a debtor, such as CSC, with a pending, unconsummated plan would be allowed to file a new petition concerning the same debt in an attempt to avoid enforcement of the plan confirmed in the earlier proceeding.

Accordingly, the bankruptcy court's order of March 26, 1984 is AFFIRMED.

SO ORDERED, this 27 day of JUNE, 1985.

/s/ RICHARD C. FREEMAN
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COLONY SQUARE COMPANY,
a Georgia Limited Partnership

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

CIVIL ACTION FILE NO. C84-1621A

ON APPEAL FROM BANKRUPTCY CASE
NO. B75-3523A

FILED IN CLERK'S OFFICE

6/28/85

LUTHER D. THOMAS, Clerk

ORDER

On June 25, 1984, Judge Hugh Robinson, Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of Georgia enjoined Colony Square Company (CSC), its partners, agents, attorneys, representatives, and creditors from pursuing certain activities. They were specifically enjoined from:

> 1. Commencing or continuing any reorganization, liquidation, insolvency or other proceeding against or otherwise affecting the Colony Square property or the indebtedness of Colony Square Company to Prudential other than action taken in this Court or in the United States District Court for the Northern District of Georgia and/or in the federal appellate courts on appeal from this Chapter XII Court in connection with this Chapter XII Case or on appeal from the Memorandum Opinion of the Chapter 11 Court in

Atlanta, entered March 26, 1984, dismissing the prior Chapter 11 Case.

2. Seeking to cite Prudential or its legal counsel for contempt or otherwise taking any action against Prudential, its officers, agents, employees or its legal counsel for proceeding in the June 22 Hearing in any court or forum other than this Chapter XII Court; provided that nothing contained herein shall prevent any appeals or requests for post-judgment relief by any party from any orders or judgments of this Court entered as a result of the June 22 Hearing.

Bankruptcy Court's order of June 25, 1985, at 3-4. The bankruptcy court stated that this injunction was entered "in aid of its exclusive jurisdiction as expressly retained by this Chapter XII Court and in order to protect the same . . . ." *Id.* at 3. CSC appeals this order.

The procedural and factual background of Colony Square bankruptcy proceedings are well known to the court and all the parties, and therefore will not be repeated here. *See In Re Colony Square Company*, Civil Action No. C84-1793A, (N.D. Ga. April 2, 1985).

CSC argues that the automatic statutory stay under 11 U.S.C. § 362, which was triggered by the filing of the involuntary Chapter 7 proceeding in the bankruptcy court in Pittsburgh, barred Prudential and the Chapter XII bankruptcy court in Atlanta from taking any action regarding CSC's property and from seeking or entering the order of June 25.[1] CSC maintains that the order is overbroad because the injunction against CSC's "creditors" violates

[1]CSC later converted the Chapter 7 proceeding to a Chapter 11 proceeding for reorganization. The Chapter 11 case was subsequently transferred to the Georgia Courts, and then was dismissed by the Atlanta bankruptcy court. The order of dismissal was affirmed by this court in *In re Colony Square Company*, Civil Action No. C84-1109A (N.D. Ga. June 27, 1985).

the Due Process Clause of the Fifth Amendment. In entering this injunction, CSC contends that the bankruptcy court exceeded its jurisdiction because the enjoined "creditors" of CSC include individuals and entities who are not parties to the Chapter XII proceeding, which is the basis for the bankruptcy court's jurisdiction. This injunction also violates the due process rights of these creditors, CSC asserts, because they were not given reasonable notice and a right to be heard before entry of the injunction. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). CSC argues that there is no authority for an injunction which purports to cover non-parties not in privity with any parties to the case and who are outside the *in personam* jurisdiction of the court.

CSC asserts that the order and injunction of June 25 are procedurally unsound because the Atlanta bankruptcy court has attempted to exercise powers which exceed the scope of the bankruptcy legislation. Although the injunction does not explicitly apply to the Pittsburgh bankruptcy court, CSC argues that the order and injunction of June 25 "reveals the transparent attempt of the Atlanta Bankruptcy Court to circumvent the clear command of Congress not to enjoin another Court." Brief of Appellant CSC at 13. CSC also alleges that the injunction violates the procedural requirements of Bankruptcy Rules 703 and 704 because the proceeding which resulted in the issuance of the injunction was initiated by a motion rather than a complaint and there was no issuance of a summons and service of process on any adverse party.

Prudential argues that the bankruptcy court properly exercised its discretion in entering the injunction order in aid of its jurisdiction because CSC was attempting to avoid that jurisdiction by pursuing Chapter 11 proceedings in other courts during the pendency of the Chapter XII case in the Atlanta bankruptcy court. Because the Atlanta bankruptcy court retained jurisdiction over the Colony Square

Property for the purpose of enforcing the confirmed Chapter XII Plan, *see* Order of the Atlanta Bankruptcy Court dated March 30, 1977, Prudential asserts that it was proper for the Chapter XII court to issue the injunction in aid of its jurisdiction. *See In the Matter of Macon Uplands Venture*, 624 F.2d 26 (5th Cir. 1980). *In Macon Uplands*, the district court enjoined the debtor from proceeding with a Chapter 11 petition that had been filed in another court because a previously filed Chapter XII case, which had been dismissed, was on appeal. The Fifth Circuit Court of Appeals affirmed the issuance of the injunction, finding that the district court, in aid of its jurisdiction, had the power to enjoin the debtor from pursuing other actions which concerned the subject matter of the Chapter XII appeal. *Id.* at 28. Prudential maintains that the arguments in favor of an injunction are even stronger in this action because unlike the Chapter XII case in *Macon Uplands Venture*, the Chapter XII proceeding in this case is open and ongoing.

Prudential also asserts that there is no automatic stay pursuant to section 362(a) which affects the Chapter XII court or itself because section 403(a) of the Bankruptcy Reform Act (the "Code"), precludes the application of the Code provisions to cases such as the Chapter XII proceeding, which were commenced under the old Bankruptcy Act. *See Central Trust Company v. Creditors Committee*, 454 U.S. 354, 102 S.Ct. 695 (1982). In *Central Trust Company*, the Supreme Court stated:

> The language of Section 403(a) is unequivocal. It provides that cases filed under the Bankruptcy Act "*shall* be conducted and determined under such Act as if [the New Code] had not been enacted." It makes no exception for petitions to be refiled under the new Code; indeed, it expressly provides that petitions such as [the debtor's] "*shall* continue to be governed" by the Bankruptcy Act.

Id. at 357, 102 S.Ct. at 696-697 (emphasis in the original). Because the substantive and procedural rights of CSC and Prudential are contained in the Chapter XII plan and the confirmation order, Prudential argues that to hold that section 362 of the Code is applicable to continuing proceedings in the Chapter XII court would be in direct conflict with the provisions of section 403(a) of the Code and the Supreme Court's holding in *Central Trust Company.*

The court concludes that the automatic stay provision of section 362 of the Code had no effect on the Chapter XII proceeding or on the Atlanta bankruptcy court's power to issue an injunction in aid of its jurisdiction. This finding is consistent with the Supreme Court's opinion in *Central Trust Company.* In issuing the injunction the Atlanta bankruptcy was acting to protect is jurisdiction over the subject matter of the on-going Chapter XII proceeding and to continue to conduct that proceeding as if the various proceedings filed pursuant to the new Act had never been initiated. The issuance of the injunction was a defensive move by the bankruptcy court, taken so that it could continue to conduct the Chapter XII proceeding in the face of the repeated efforts of CSC and others to pursue new proceedings under the Act which purported to include the subject matter of the Chapter XII case within their scope. The court finds that the bankruptcy court properly exercised its discretion in issuing the injunction to protect its jurisdiction over the subject matter of a pending case in these circumstances.

The court also finds that the alleged procedural errors in the injunction are not cause for reversal because CSC has not shown that any prejudice occurred from these errors under the bankruptcy rules. *See Macon Uplands Venture,* 624 F.2d at 28.

In light of the foregoing discussion and resolution of this appeal, the court will deny CSC's motion for oral argument as moot.

Accordingly, the bankruptcy court's order of June 25, 1984, is AFFIRMED. The motion for oral argument is DENIED as moot.

SO ORDERED, this 26 day of JUNE, 1985.

/s/ RICHARD C. FREEMAN
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

COLONY SQUARE COMPANY,
a Georgia Limited Partnership

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

C84-1621A

HONORABLE RICHARD C. FREEMAN

Decision by Court. This action came for consideration before the Court with the judge named as presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Bankruptcy Court's order of June 25, 1984 is affirmed.

FILED AND ENTERED IN CLERK'S OFFICE
This 28th day of June , 1985
Luther D. Thomas, Clerk

By: /s/ TAMMY L. COLE
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

C84-1245A

FILED IN CLERK'S OFFICE
U.S.D.C.—Atlanta

APR 4 1985

LUTHER D. THOMAS, Clerk

ORDER

This is an appeal of the order of May 14, 1984, entered by Judge Hugh Robinson, Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of Georgia. The parties' briefs in this appeal were incorporated by reference in their briefs filed in a related appeal of the bankruptcy court's order of June 25, 1984. *See* Civil Action No. C84-1793A. On April 2, 1985, this court entered an order affirming the bankruptcy court's decisions of June 25, 1984 and May 14, 1984. The parties are referred to this court's order of April 2, 1985, in Civil Action No. C84-1793A for a discussion of the parties arguements presented in this appeal and the court's ruling on the appeal. The bankruptcy court's order of May 14, 1984, is hereby AFFIRMED.

SO ORDERED, this 4th day of APRIL, 1985.

/s/ RICHARD C. FREEMAN
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

C84-1793A

FILED IN CLERK'S OFFICE
U.S.D.C.—Atlanta

APR 2 1985

LUTHER D. THOMAS, Clerk

ORDER

On June 25, 1984, Judge Hugh Robinson, Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of Georgia, ordered that the March 30, 1977 order of the bankruptcy court be enforced. The March 30 order confirmed the "Consolidated Plan of Arrangement" (the "Plan"), filed by The Prudential Insurance Company of America ("Prudential") and agreed to by Colony Square Company ("CSC"), the debtor in the Chapter XII proceeding, and other parties who are not parties to this action. The enforcement of the March 30 order, pursuant to the June 25 order, required, *inter alia,*

> the conveyance of all right, title and interest of Colony Square Company, a Georgia Limited Partnership, in and to the Colony Square real estate complex located in Atlanta, Fulton County, Georgia and the name "Colony Square" used in connection therewith, from Colony Square Company to The Prudential Insurance Company of America, be and the same is ordered to the enforced.

* * *

> and further, that this order shall operate to cancel the indebtedness owing from Colony Square Company, a Georgia Limited Partnership, to Prudential, as and to the extent provided in the Moratorium Agreement dated February 11, 1977 between said parties;

Order of June 25, 1984 at 8-9. CSC appeals Judge Robinson's order of June 25 which enforced the March 30, 1977 order.

I. Issues on Appeal

CSC raises two issues in this appeal: (1) whether section 403(a) of the Bankruptcy Reform Act of 1978 (the "Code") and the retention of jurisdiction by the Atlanta bankruptcy court over the relationship between Prudential and Colony evolving from the Chapter XII plan of arrangement confirmed in the Chapter XII case require, as a matter of law, that section 362 of the Code have no force and effect as to Prudential, CSC, and the Atlanta bankruptcy court; and (2) whether the May 14, 1984 order of the bankruptcy court severing CSC's mismanagement claims against Prudential and allowing them to be asserted as a counterclaim for damages was an abuse of discretion by the bankruptcy judge.[1]

II. Factual Background

On October 16, 1975, CSC filed a voluntary petition under Chapter XII of the Bankruptcy Act of 1898 (formerly 11 U.S.C. § 701 *et seq.*) (the "Act"). In an order

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[1]The order of May 14, 1984 is the subject of a separate appeal to this court, docketed as Civil Action No. C84-1245A. Consideration of the direct appeal of the May 14 order was deferred pursuant to a procedural ruling by this court. The merits of the appeal of the May 14 order have been fully briefed by the parties in the direct appeal. These briefs have been incorporated by reference into the briefs filed in the instant case. Because the issue is ripe for determination, the court will consider the merits of the May 14 order at this time.

dated March 30, 1977, the bankruptcy court confirmed the Chapter XII Plan for CSC which has been proposed by Prudential, the principal secured creditor of CSC, and consented to by CSC. *See* Prudential's Exh. 1 in Appendix 1. The March 30 order discharged the indebtedness of CSC, except for its indebtedness to Prudential. CSC has continued its business under the Plan since the date of confirmation. The Plan included a Lease Agreement that provided that CSC would continue its ownership of the Colony Square Complex (the "Property"), with Prudential, as lessee, responsible for its management. *See* Prudential's Exh. 3 in Appendix 1. Under the terms of the Lease, Prudential was to take possession of and operate the Property for a period initially ending December 31, 1981. Each year CSC's debt to Prudential would be reduced by "net cash flow" (defined in the Lease), and CSC would either bring the debt current or would refinance its debt with another lender. CSC also had the right to terminate the Lease prior to December 1981, by paying Prudential's entire debt or by bringing Prudential's debt current. In addition, CSC would be obligated to reimburse Prudential for its outlay, an amount in excess of $5 million, which was required to fund the Chapter XII Plan, as well as to pay for capital and leasehold improvements made to the Property during Prudential's term of possession and management. The Lease also required Prudential to provide CSC with audited financial statements for the property and other information.

Pursuant to the terms of the Moratorium Agreement, *see* Prudential's Exh. 4 in Appendix 1, which was entered into concurrently with the Lease, Prudential's right to enforce its claim on CSC's indebtedness was postponed for the duration of the Lease, provided that CSC made certain cash contributions to the operations of the Property on an annual basis. The Moratorium Agreement provided that prior to January 1, 1982, CSC had no obligation to make

payments of principal on account of its indebtedness to Prudential, except to the extent of the rental payments received from Prudential under the Lease. The Moratorium Agreement also provided that the unpaid balance on CSC's indebtedness, with interest, was due on January 1, 1982, if CSC did not bring its indebtedness to Prudential current prior to January 1, 1982. If CSC did not perform its obligations and exercise its right to terminate the Lease by paying Prudential in full or bringing Prudential current, and making the extra reimbursement payments, Prudential could then exercise its remedies. One of the remedies contained in the Moratorium Agreement gave Prudential the option to purchase the Property (in lieu of foreclosure) in exchange for cancellation of CSC's indebtedness to Prudential. If this option was chosen, Prudential was also granted the right to purchase the name "Colony Square."

The March 30 confirmation order also provided that the Atlanta bankruptcy court retained exclusive jurisdiction over the rights and obligations of the parties with respect to the Chapter XII Plan:

> This Court shall retain jurisdiction to enforce this order and the Plan . . . this Court shall, as provided in the Plan, retain exclusive jurisdiction of the Debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto.

Order of March 30, 1977 at ¶ (f), pp. 7-8. The Chapter XII Plan also specifically provided that jurisdiction over the proceeding would be retained by the bankruptcy court:

> Following confirmation, the Court will (i) retain jurisdiction to supervise the effectuation of this plan and to issue ancillary orders as may be necessary in connection therewith, and (ii) retain exclusive jurisdiction over the Remaining Property to supervise and enforce the compliance by CSC and Prudential with their

> agreements with each other, . . . and any purchase or foreclosure by Prudential with respect to any of the Remaining Property. Except for matters described in clause (ii) above, the Court will not exercise continuing jurisdiction over the Remaining Property after Final Confirmation.

Chapter XII Plan at ¶ (2), p. 15, attached as Exhibit 1 to Prudential's Appendix I.

CSC failed to make its cash contribution during 1981, and also failed to pay Prudential in full or bring the debt current. Prudential accelerated its debt by notice to CSC dated December 14, 1981. This acceleration was subject to CSC's right to redeem. On January 8, 1982, Prudential gave CSC notice that it would exercise its option to acquire a deed in lieu of foreclosure and purchase the name "Colony Square." January 29, 1982 was set as the date for tender of the debt-cancellation documents.

On January 28, 1982, CSC filed a Chapter 11 case under Title 11, United States Code, as amended by the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.* This action was filed in the Bankruptcy Court for the Western District of Pennsylvania (the "Pittsburgh bankruptcy court"). The transfer of title to the Property from CSC to Prudential, scheduled on January 29, never took place.

Prudential moved to dismiss the Chapter 11 case in Pittsburgh. The Pittsburgh bankruptcy court denied the motion in May 1982, finding, *inter alia,* that it had jurisdiction over CSC's Chapter 11 petition, that the petition was timely filed in good faith, and that abstention was not proper under either 11 U.S.C. § 305 or 28 U.S.C. § 1471. *In re Colony Square Co.*, 22 B.R. 92 (Bankr. W.D. Pa. 1982).

Prudential appealed this order of the Pittsburgh bankruptcy court. In April 1983, the United States District Court for the Western District of Pennsylvania reversed

the Pittsburgh bankruptcy court and remanded the action with instructions to transfer the part of the proceeding involving CSC's debt to Prudential to the bankruptcy court in Atlanta, pursuant to 28 U.S.C. § 1475, for the purpose of ruling on Prudential's motion to dismiss. Subsequently, the district court in Pittsburgh withdrew the reference of the case to the Pittsburgh bankruptcy court, and in November 1983, transferred the Chapter 11 case to this court. By an order entered February 2, 1984, this court referred the Chapter 11 case to the bankruptcy court in Atlanta. On March 26, 1984, the bankruptcy court, per Judge Robinson, dismissed the Chapter 11 case. This order has been appealed by CSC and is docketed in this court as Civil Action No. C84-1109A. On April 30, 1984, an involuntary petition under Chapter 7 of the Code was filed against CSC in the Western District of Pennsylvania. CSC converted this action to a Chapter 11 proceeding under the Code on June 20, 1984. Prudential has also filed to dismiss this second Chapter 11 case pending in the Pittsburgh court.

On February 9, 1984, Prudential filed a motion to compel CSC's compliance with the Chapter XII Plan. In its response and counterclaim CSC raised several defenses to the motion for enforcement of the Plan, including waiver, estoppel, unclean hands, discharge, impossibility, excuse, and bad faith. Briefs were filed and hearings were held before Judge Robinson on the issue of the effect, if any, of section 362 of the new Code on a case pending under Chapter XII of the old Act. The parties also briefed and argued the question of whether CSC could assert its claims that Prudential mismanaged the Property in opposition to Prudential's motion for enforcement of the Chapter XII Plan. On May 14, 1984, the bankruptcy court issued an order denying CSC's request that the bankruptcy court consider CSC's mismanagement and bad faith claims against Prudential in connection with Prudential's motion

to compel compliance with the Chapter XII Plan. CSC has appealed this order, which has been docketed in this court as Civil Action No. C84-1245A.

On June 22, 1984, the final hearings were held before Judge Robinson on Prudential's motion to compel enforcement of the Chapter XII Plan. At the hearing, CSC argued that the bankruptcy court and Prudential were stayed from proceeding with the hearing by the filing of the involuntary Chapter 7 case in the Pittsburgh bankruptcy court. (CSC had converted this action into a Chapter 11 case on June 20, 1984). CSC asserted that the automatic stay provision of section 362 of the Code operated to stay the proceedings in the Atlanta bankruptcy court concerning the Chapter XII Plan. On June 25, 1984, Judge Robinson entered the order enforcing the Chapter XII Plan, which is the subject of the instant appeal.

III. Was the Atlanta Bankruptcy Court Stayed from Enforcing the Chapter XII Plan by a Stay Pursuant to 11 U.S.C. § 362 Arising from the Chapter 11 case in the Pittsburgh Bankruptcy Court?

11 U.S.C. § 362(a) of the code provides that the filing any petition for relief operates as a stay, *inter alia*:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against the property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor that arose before the commencement of the case under this title.

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

CSC argues that the section 362 stay triggered by the second Chapter 11 proceeding in the Pittsburgh bankruptcy court, filed on April 30, 1984 as a Chapter 7 case, stayed any proceeding to enforce the Chapter XII Plan in the Atlanta bankruptcy court. CSC contends that Judge Robinson's order enforcing the Chapter XII Plan was made in violation of the section 362 stay arising from the Chapter 11 proceeding in the Pittsburgh bankruptcy court. Any act to enforce or execute a judgment on the Property, CSC asserts, would violate the automatic stay under section 362(a)(2), (3). *See, e.g., In re Marcott,* 30 Bankr. 633, 636 (Bankr. W.D. Wis. 1983). CSC maintains that the fact that the judgment was obtained in proceedings before the filing of the petition is irrelevant. *In re Schwab,* 12 Bankr. 68, 71 (Bankr. D. Mass. 1981). The continuation of a judicial proceeding in which permanent posession of the Property is sought, CSC argues, would also be in violation of the automatic stay. *In re Lewis,* 15 Bankr. 643 (Bankr. E.D. Pa. 1981). CSC asserts that any action against the Property is barred by section 362 because the Property is included within the bankruptcy estate in the pending Chapter 11 proceeding in Pittsburgh. The estate includes " . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). CSC contends that there is nothing in the Code or the legislative history to suggest that a court may abrogate section 541(a) by retaining "exclusive" jurisdiction over specific assets

such as the Atlanta bankruptcy court purported to do in the Chapter XII Plan and its order of March 30, 1977. *See* Chapter XII Plan at ¶ (2), p. 15; Atlanta bankruptcy court's order of March 30, 1977 at ¶ (ff), pp. 7-8. Until the stay arising from the Pittsburgh bankruptcy proceedings is resolved, CSC asserts that the Atlanta bankruptcy court has no jurisdiction to act, and thus any action by it is void *ab initio.*

CSC also contends that a court does not have the power to *sua sponte* offer relief from an automatic stay. *In re Mimis' of Atlanta, Inc.,* 5 Bankr. 623, 630 (Bankr. N.D. Ga. 1980). The grounds for relief from a stay are set forth in section 362(d). Relief pursuant to section 362(d) is available only "on request of a party in interest . . . " CSC points out that Prudential has not filed such a motion for relief in the Chapter 11 proceeding in the Pittsburgh bankruptcy court. CSC also asserts that in entering the order of June 25, Judge Robinson usurped the jurisdiction of the Pittsburgh bankruptcy court in that his order amounts to a de facto dismissal of the Chapter 11 proceeding pending in the Pittsburgh court.

Prudential argues that there is no stay pursuant to section 362(a) which affects either Prudential or the Atlanta bankruptcy court. Prudential asserts that section 403(a) of the Code precludes the application of the new Code to cases commenced under the former Bankruptcy Act.

Section 403(a) of the code provides:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of the parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be

> governed by the law applicable to such case, matter or proceeding as if the Act had not been enacted.

Prudential maintains that because the Chapter XII case is a case commenced under the Act, under the terms of section 403(a) it is to be conducted as if the Code had never been enacted. *Central Trust Company v. Creditors Committee,* 454 U.S. 354, 102 S.Ct. 695 (1982). In *Central Trust Company,* the Supreme Court held that a debtor could not dismiss a Chapter XI case filed under the Act in order to refile in a consolidated proceeding with several of its affiliates under the Code. The Supreme Court reversed the United States Court of Appeals for the Second Circuit, which had allowed the dismissal of the proceeding filed under the Act. The Second Circuit had read section 403(a) in conjunction with Bankruptcy Rule of Procedure 11-42(a) and found that the "operative tests" was "whether the estates' best interest" would be served by permitting dismissal and refiling. *In re Geiger Enterprises, Inc.,* 635 F.2d 106, 109 (2d Cir. 1980). The Supreme Court rejected this interpretation of section 403(a), stating:

> The language of § 403 is unequivocal. It provides that cases filed under the Bankruptcy Act "*shall* be conducted and determined under such Act as if [the New Code] had not been enacted." . . . Any exception to this mandate recognized by the Court of Appeals is of wholly judicial creation, supported by neither the language of the New Code nor its legislative history.

Central Trust Company, 454 U.S. at 357, 102 S.Ct. at 696-697 (footnote omitted) (emphasis in the original).

Prudential maintains that the substantive and procedural rights of both CSC and itself are contained in the Chapter XII Plan and the confirmation order of March 30, 1977. *See In the Matter of Lincoln Plaza Towers Associates,* 6 B.R. 808, 815 (Bankr. S.D.N.Y. 1980) (Analyzing section 403(a), the bankruptcy court stated: " . . . if a case

had been (1) commenced under the 1898 Act, and (2) conducted and determined under that law, then the substantive rights of the parties in connection with that case, shall continue to be governed by the law of the 1898 Act.") Prudential argues that to hold that the stay provision of section 362 of the Code is applciable to the rights established in the Chapter XII case would be in direct contravention to the terms of section 403(a) of the Code and the Supreme Court's holding in *Central Trust Company.*

Prudential objects to CSC's assertion that the order of June 25, 1984 amounts to a de facto dismissal of the Chapter 11 case pending in Pittsburgh and a usurpation of the jurisdiction of the Pittsburgh bankruptcy court by the Atlanta bankruptcy court. Prudential argues that because a section 362 stay has no effect on the Chapter XII proceeding, the order of June 25, enforcing the March 1977 Plan, was within the proper jurisdiction of the bankruptcy court.

The court finds that the automatic stay provision of section 362 of the Code had no effect on the Chapter XII proceeding in the Atlanta bankruptcy court. In reaching this conclusion the court is guided by the Supreme Court's opinion in *Central Trust Company,* in which it held that section 403(a) meant exactly what it says: "that cases filed under the Bankruptcy Act '*shall* be conducted and determined under such Act as if [the New Code] had not been enacted.' " *Central Trust Company,* 454 U.S. at 357, 102 S.Ct. at 696-697. In its order of June 25, 1984, the Atlanta bankruptcy court followed the dictates of section 403(a) and continued the Chapter XII proceeding as if the Chapter 11 case had not been filed in the Pittsburgh bankruptcy court in 1984. It is clear from the language of section 403(a), and the Supreme Court's literal interpretation of it, that a section 362 stay triggered by a filing under the new

Code has no effect on the continuing Chapter XII proceeding in this district.[2]

The substantive and procedural rights of Prudential and CSC were determined during the Chapter XII proceeding under the old Act. These rights are contained in the Chapter XII Plan and the order of March 30, 1977. The bankruptcy court's order of June 25, 1984 enforces the Chapter XII Plan pursuant to the terms of the Plan and the March 30 order. Thus, it is clear that the Chapter XII proceeding is continuing "as if the new Code had not been enacted." *Central Trust Company,* 454 U.S. at 357, 102 S.Ct. at 696-697. The court will affirm that portion of the bankruptcy court's order which found that neither the court itself nor the parties to the Chapter XII case were stayed from proceeding in that action by section 362 of the Code.

IV. Was the Bankruptcy Court's Order Severing CSC's Damages Claim a Proper Exercise of Discretion?

On May 14, 1984, the Atlanta bankruptcy court denied CSC's request that it hear CSC's claims against Prudential in conjunction with Prudential's motion to enforce the Chapter XII Plan. The bankruptcy court summarized CSC's argument as follows:

> Prudential, as lessee and manager of the Colony Square complex, wilfully and negligently mismanaged the complex during the five year lease term, thereby precluding CSC from obtaining the funds necessary to fulfill its repayment obligations under the plan, and excusing CSC from such repayment. CSC contends that Prudential's mismanagement of the property dissuaded other lenders from refinancing the loan prior

[2]The court finds that the caselaw relied on by CSC in support of its argument on this issue is not controlling. None of the cited cases address the effect of a section 362 stay on a proceeding under the old Act.

to the January 1, 1982 due date. It argues that the aforementioned allegations, if proved as affirmative defenses, will serve as a bar to Prudential's right to foreclose under the plan.

Bankruptcy court's Order of May 14, 1984, at 3.

Under the terms of the Lease, Prudential acquired the right to enter into contracts and leases, if they were "consistent with good business practices," as well as the obligation to maintain prior records concerning the Property. *See* Lease §§ 5.1 and 11.1, attached as Prudential's Exh. 3 in Appendix 1. CSC alleged that Prudential violated numerous provisions of the Lease while managing the Property prior to January 1, 1982. For example, CSC asserted that the Lease violations concerning the hotel included:

(1) failure to post signs adequately directing the public to the hotel;

(2) permitting the payroll cost of operating the hotel to exceed, by at least One Million ($1,000,000.00) Dollars annually, the payroll costs needed to operate a hotel of its kind successfully;

(3) failure to maintain sufficient control over the cost of supplies;

(4) permitting the cost of advertising, sales and public relations to become excessively high;

(5) failure to supervise, train and motivate the hotel's staff in an adequate fashion;

(6) failure to provide adequate cleaning and housekeeping services;

(7) maintaining inadequate accounting reporting and control procedures;

(8) permitting the occupancy rate to be substantially below that of similar hotels in the Atlanta market;

(9) failure to market and promote the hotel effectively and properly; and

(10) general mismanagement of the hotel.

Order of May 14, 1984, at 4.

In determining whether CSC's mismanagement claims should serve as an affirmative defense to Prudential's motion to enforce the Chapter XII Plan and foreclose on the Property, the bankruptcy court "looked to whether the parties intended proper management as a prerequisite to CSC's duty to pay off the loan, and whether it would be equitable in this instance to permit CSC's claims to serve as a potential bar to Prudential's claim for relief." *Id.* at 4-5. The bankruptcy court found that under the Lease and Moratorium Agreement, the covenant made by CSC to pay the loan in full by January 1, 1982, was separate and distinct from Prudential's covenant regarding the management of the Property under the Lease. The bankruptcy court found that nothing in the language of the Moratorium Agreement indicated that proper management by Prudential was a prerequisite to Prudential's right to foreclose in the event of default by CSC. Nor was there language to indicate that CSC was required to pay off the loan only if satisfied with Prudential's management of the Property. *Id.* at 5. The bankruptcy court, therefore, refused to hear CSC's claims in conjunction with Prudential's motion to enforce the Chapter XII Plan.

Judge Robinson also noted that although CSC had rights and remedies under the Lease and could have filed a motion in the bankruptcy court alleging noncompliance with the terms of the Lease, no such motion was filed at any time during the leasehold period. For example, in the

event of default by Prudential, CSC was required to give written notice and an opportunity to cure; in other instances, CSC could terminate the lease with written notice to Prudential. *See* Lease, § 15.1. CSC never exercised these remedies. The bankruptcy court found that in light of CSC's dilatory conduct in presenting these claims, it would be inequitable to permit the claims to bar Prudential's remedies under the Chapter XII Plan. Order of March 14, at 5-7.

CSC argues that the bankruptcy judge erred in entering the order of June 25, which transferred title to the Property, before hearing CSC's affirmative defenses of mismanagement and bad faith. CSC maintains that under the Lease and Moritorium Agreement, Prudential had the express duty to manage the Property in a commercially reasonable manner. Further, CSC asserts there was an implied covenant of good faith, and an implied promise not to prevent or hinder performance by the other party. *See* 11 *Williston on Contracts* § 1296 (Jaeger ed. 1968). CSC maintains that Prudential's violations of these convenants constitute a material breach of the Plan, thus relieving CSC from its obligations under the Plan to tender the deed. *See Restatement (Second) of Contracts,* §§ 237, 241 (1981). In addition, CSC argues that as a court of equity, the bankruptcy court should not permit Prudential to profit from its wrongdoing. *Katchen v. Landy,* 382 U.S. 323, 86 S.Ct. 467 (1966).

CSC also argues that it and its partners will be severely prejudiced if the bankruptcy court's orders of May 14 and June 25 are affirmed without giving CSC the opportunity to present its affirmative defenses to the enforcement of the Plan. If the title to the Property is transferred to Prudential pursuant to the June 25 order, CSC asserts that its partners will incur a large tax obligation. *See* Treas. Reg. § 1.16-2. If CSC is denied the opportunity to litigate the mismanagement claims in the same tax year as the liability

for the long term capital gains on the Property would accrue, CSC contends there would be no cash flow from which to pay the tax due. CSC also asserts that it is unlikely that its partners could recover their tax liabilities as damages in an action against Prudential. *See Caron v. United States,* 410 F. Supp. 378 (D.R.I. 1976), *aff'd,* 548 F.2d 366 (1st Cir. 1976). CSC maintains that Prudential would not suffer any prejudice if this court reversed the orders of May 14 and June 25 because Prudential would continue to have possession of and control the management of the Property until CSC's claims against Prudential are resolved. Reversing these two orders, CSC asserts, would preserve the status quo for both parties and prevent the irreparable harm to CSC which would result if title to the Property is transferred to Prudential at this time.

Prudential argues that the bankruptcy court's order severing CSC's damage claims was a proper exercise of discretion and should be affirmed. Prudential asserts that the bankruptcy court's determination that the parties' relationship under the Moratorium Agreement was independent of their relationship as lessee and lessor under the management provisions of the Lease is correct and is fully supported by the language of the Lease, Moratorium Agreement, and the Chapter XII Plan.

Prudential also rejects CSC's contention that Prudential will suffer no prejudice if the June 25 order is reversed. Prudential maintains that it has already been substantially and significantly harmed. Prudential points out that although it was entitled to claim its deed to the Property in January 1982 and attempted to foreclose at that time, it has been denied its rights by the various proceedings initiated by CSC or others which purport to affect the Property (e.g., the first Chapter 11 case filed in January 1982 in Pittsburgh). Prudential contends that the uncertainty resulting from CSC's repeated attacks on Prudential's rights casts a cloud on Prudential's title and over the future

of the management of the Property, as well as depriving Prudential of its remedies as a lender for an unreasonably prolonged period.

After reviewing the bankruptcy court's order of March 14, 1984, the parties' briefs filed in the instant appeal, and the briefs filed in the direct appeal of the May 14 order, the court holds that the bankruptcy judge correctly found that the parties' rights and obligations under the Moratorium Agreement and the Lease are independent, and thus CSC's mismanagement claims cannot serve as a bar to Prudential's claim for relief by means of foreclosure on the Property. After examining the lanaguage of the Chapter XII Plan, the order of March 30, 1977, the Lease, and the Moratorium Agreement, the court finds no indication that Prudential's remedies under the Moratorium Agreement are dependent upon the quality of its management under the Lease; the only condition precedent to the exercise of Prudential's right to foreclose upon the Property was default by CSC. The court agrees with Judge Robinson's conclusions that nothing in the language of these documents indicates that CSC was obligated to pay off its loan *only* if satisfied with the quality of Prudential's management of the Property. The court holds that the bankruptcy court's order severing CSC's mismanagement claims from its consideration and ruling upon Prudential's motion to compel compliance with the order of March 30, 1977, was correct. The order of May 14, 1984, is therefore affirmed.

V. Conclusion

Accordingly, the bankruptcy court's orders of June 25, 1984 and May 14, 1984, are AFFIRMED. On August 31, 1984, this court entered an order staying enforcement of the June 25 order pending appeal. In light of the above ruling, the stay will be VACATED. The clerk is DIRECTED to vacate the stay five (5) days from the date of entry of this order.

SO ORDERED, this 2d day of April, 1985.

/s/ RICHARD C. FREEMAN

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

CHAPTER XII
CASE NO. B75-3523A

FILED & ENTERED IN
U.S. BANKRUPTCY COURT
ATLANTA, Georgia

JUN 25 1984

JOHNNY L. PRESSLEY, Clerk

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that the Order attached as Exhibit "A" hereto is made the judgment of this Court.

This 25 day of June, 1984.

/s/ HUGH ROBINSON
HUGH ROBINSON
UNITED STATES BANKRUPTCY
JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

CHAPTER XII
CASE NO. B75-3523A

FILED IN U.S. BANKRUPTCY COURT
ATLANTA, Georgia

JUN 25 1984

JOHNNY L. PRESSLEY, Clerk

JUDGE ROBINSON

ORDER

On February 9, 1984, the Prudential Insurance Company of America (hereinafter "Prudential") filed a motion (the "Prudential Motion") in this case requesting an Order enforcing the Order of this Court of March 30, 1977 confirming the "Consolidated Plan of Arrangement" (hereinafter the "Plan"), filed by Prudential and agreed to by Colony Square Company (hereinafter "Colony"), the debtor in this case, and other parties then who are not parties to this matter.

Prudential asserts that on January 8, 1982, following the last date when Colony was authorized to retake possession of the Colony Square real estate complex (the "Property"), December 30, 1981, Prudential gave notice of its intention to take title to the Property by deed in lieu of foreclosure and set January 29, 1982 as the date for Prudential to tender to Colony a document cancelling the debt owed to Prudential by Colony. On January 28, 1982,

Colony filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Title 11, in the United States Bankruptcy Court for the Western District of Pennsylvania. Prudential contends that its tender was thereby excused, and, since the Chapter 11 Case was ultimately transferred to the Bankruptcy Court for the Northern District of Georgia and dismissed by order entered March 26, 1984, Prudential is entitled to relief.

In its defense, Colony contends that Prudential itself breached its own duties under the Plan, basically, through the alleged mismanagement of the Property since Prudential went into possession in March, 1977 under a lease incorporated in the Plan. Colony contends that Prudential's mismanagement prevented Colony from refinancing the Property thereby rendering Colony unable to make the substantial payments to Prudential under the Plan, necessary to re-take possession at the end of 1981.

The parties have submitted numerous briefs and memoranda to the Court, and have been offered the opportunity to present such evidence as they desired to bring forward. The Court, in a separate order, entered May 14, 1984, ruled that Colony's assertions based upon alleged mismanagement by Prudential could not be used in defense of Prudential's claim to title to the Property. The Court has now conducted hearings on March 6, 1984, March 15, 1984, and June 22, 1984 on Prudential's motion, and has considered the memoranda, briefs (including a brief filed by Colony at approximately 11:00 o'clock A.M. during the course of the June 22, 1984 hearing), evidence and argument presented by both parties, and concludes that the matter is ripe for decision.

At the opening of the June 22, 1984 hearing, the Court denied an oral motion, by Colony's Pittsburgh counsel, to stay the proceedings based upon the fact that there is now pending a new case in the United States Bankruptcy Court

for the Western District of Pennsylvania, which was commenced as an involuntary Chapter 7 case under the Bankruptcy Reform Act of 1978 against Colony by certain current unsecured creditors. The Court took judicial notice of the petition, an order for relief, and an election filed in that case by Colony to convert that case to Chapter 11. In overruling the motion, the Court made it explicit that this Court has determined that the matter of this debt from Colony to Prudential is within the exclusive jurisdiction of this Court as provided in its March 30, 1977 order. This jurisdiction expressly includes Colony's interest, if any, in the Property. Counsel for Colony suggested that not only might this Court be stayed, but that Prudential also may be stayed from proceeding further. Prudential has never conceded the applicability of 11 U.S.C. § 362 arising out of the bankruptcy proceedings in Pittsburgh, and relies on Section 403a of the Bankruptcy Reform Act. As counsel for Prudential responded at the June 22 hearing, Prudential has nevertheless deferred to and respected the authority of the other Court in the earlier case filed on January 29, 1982, and waited over two years to have its jurisdictional contentions sustained, after the expenditure of substantial fees and expenses. Colony's conduct, by contrast, has been to delay and avoid this Court's authority to resolve this case, despite its express reservation of exclusive jurisdiction. Colony now seeks, through another case, particularly its Chapter 11 election, and a "plan of reorganization" filed in that case two days prior to this Court's June 22 hearing, to further delay proceedings in this Court.

At the June 22, 1984 hearing, Colony's Pittsburgh counsel also orally moved for the recusal of the undersigned on the basis that Colony was not being treated with fairness. This Court denied the motion, and cannot determine that Colony has received any unfair treatment. The transcript of the colloquy will reflect this motion and its disposition. Colony's claims of alleged mismanagement

are being maintained in a separate action, as provided in the Court's order of May 14, 1984, and Colony is not being deprived of its day in Court. Prudential will be able to respond to any judgment if Colony is able to prevail.

FINDINGS OF FACT

1. Colony did not redeem possession of the Colony Square Complex on or before December 30, 1981, by making the payments to Prudential as required by the Plan. There is no evidence that Colony has ever attempted to do so.

2. Prudential accelerated its debt by notice to Colony dated December 14, 1981, subject to Colony's right to redeem. The debt became due in any case on January 1, 1982. Colony did not pay the debt or ever attempt to do so.

3. On January 8, 1982, Prudential gave notice to Colony of its exercise of its option to acquire the Colony Square Complex by deed in lieu of foreclosure. The notice set January 29, 1982 as the date upon which Prudential would tender a document cancelling the debt.

4. On January 28, 1982, Colony filed its voluntary Chapter 11 petition in the United States Bankruptcy Court for the Western District of Pennsylvania. That Chapter 11 case was dismissed on March 26, 1984.

5. In late April, 1984, an involuntary Chapter 7 petition against Colony was filed in the United States Bankruptcy Court for the Western District of Pennsylvania. Colony filed an election to convert the case to Chapter 11.

6. On June 20, 1984, Colony submitted a "plan of reorganization" to the Bankruptcy Court in Pittsburgh in the new case. Attached is a letter from an Atlanta attorney purporting to represent a client interested in purchasing the Colony Square Complex for $175,000,000. On June 6,

1984, Prudential's counsel wrote to an attorney in Pittsburgh (in the same firm now representing Colony in this case) that Prudential considered it inappropriate to consider requests relating to the possible sale of the property until the matter of title was cleared up through the litigation now pending. On behalf of Prudential, he offered to follow this Court's directions, if any, but desired the opportunity to be heard. As a matter of fact, the Court finds Prudential's response not to be in bad faith; Prudential is in possession of the Property, and asserts a good faith claim to title based on events taking place in January, 1982. The burden was on Colony to come forward and ask the Court to give directions to Prudential, and Prudential had a right to be heard.

7. No other facts have been introduced or brought to the Court's attention suggesting bad faith on the part of Prudential in seeking the relief requested.

8. Colony failed to make a required contribution to operating expenses, of $300,000 by December 1, 1981, the expiration of the grace period in the lease. There is no evidence that Colony ever attempted to make the payment.

9. The Colony Square Complex is located within Fulton County, Georgia, and is within this district.

CONCLUSIONS OF LAW

1. The Court's order of March 30, 1977 is and has been binding upon Colony and Prudential at all material times and Colony has a duty to carry out the Chapter XII Plan.

2. This Court, in this Case, has presently and has had at all material times, exclusive jurisdiction over the Property (and the name "Colony Square"), and the rights, duties, and obligations of Colony and Prudential in respect

thereto. Neither this Court nor the parties are stayed by 11 U.S.C. § 362 from proceeding with respect to the Property in this matter, including the Prudential Motion, Colony's responses, and Prudential's defenses to Colony's counterclaim. Colony initiated this proceeding and consented to this Court's exclusive jurisdiction by filing a voluntary Chapter XII petition on October 16, 1975. (See also Section 403a of the Bankruptcy Reform Act of 1978, and Rules of Bankruptcy Procedure, former Rule 12-43(a)). If Colony desires to maintain a further proceeding under the Bankruptcy Code which does not involve the Property or subject matter above, or interfere with the Court or parties in this matter, it may do so, and the Court so interprets the order entered March 26, 1984 dismissing the prior Chapter 11 case.

3. The facts require the relief requested by Prudential. As a matter of law, Prudential is entitled to enforcement of the Court's order of March 30, 1977 and the provisions of the Plan requiring conveyance of all right, title, and interest of Colony Square Company in and to the Property, and the name "Colony Square" used in connection therewith.

4. The record in this case justifies the Court in ordering relief pursuant to Rule 70, Federal Rules of Civil Procedure, and applicable law. Colony has persistently attacked this Court's jurisdiction and authority, as indicated in the Court's order of May 14, 1984, and has sought to delay these proceedings throughout. Colony has affirmatively acted, through filing an election to convert the new involuntary Chapter 7 case in Pittsburgh to Chapter 11, to try to place matters as they stood before the first Chapter 11 case was ordered transferred to this district by the United States District Court for the Western District of Pennsylvania on November 9, 1983 (Misc. No. 10322), referred to this Court, and subsequently dismissed by the order of March 26, 1984.

RELIEF

Accordingly, it is hereby

ORDERED, pursuant to Rule 70, Federal Rules of Civil Procedure, and applicable law and rules, that the Court's order entered March 30, 1977, requiring compliance by Colony Square Company and The Prudential Insurance Company of America with the provisions of the Consolidated Plan of Arrangement, as amended, filed in this case, insofar as it requires the conveyance of all right, title and interest of Colony Square Company, a Georgia Limited Partnership in and to the Colony Square real estate complex located in Atlanta, Fulton County, Georgia and the name "Colony Square" used in connection therewith, from Colony Square Company to The Prudential Insurance Company of America, be and the same is ordered to be enforced; and it is further

ORDERED, that this order shall operate to convey all right, title and interest of Colony Square Company, a Georgia Limited Partnership, in and to the Colony Square real estate complex, the description of which is attached hereto as Exhibit "A", to The Prudential Insurance Company of America, together with all right, title and interest of Colony Square Company, a Georgia Limited Partnership, in and to the name "Colony Square," as used in connection with said Property, and further, that this order shall operate to cancel the indebtedness owing from Colony Square Company, a Georgia Limited Partnership, to Prudential, as and to the extent provided in the Moratorium Agreement dated February 11, 1977 between said parties; and it is further

ORDERED, that the said cancellation of indebtedness is without prejudice to the latter adjustment of the account thereof, pursuant to the resolution of the certain claims being pursued in this Court as between the said parties;

provided, that the Court in no way determines the same in this order; and it is further

ORDERED, that the Clerk of the Superior Court of Fulton County, Georgia be and is hereby authorized to receive, accept, and record a copy of this order, properly certified, in the real estate records of said Clerk; and it is further

ORDERED, that the Court shall retain jurisdiction of the matters dealt with herein pending further order of the Court.

This 25 day of June, 1984.

/s/ HUGH ROBINSON
HUGH ROBINSON
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

CASE NO. B75-3523A
CHAPTER XII

JUDGE ROBINSON

ORDER

It appears and this Court specifically finds the following facts:

1. The Prudential Insurance Company of America ("Prudential") has filed a "Motion For Issuance Of Order In Aid Of Jurisdiction" ("Motion") which is now before the Court for consideration and ruling.

2. Counsel for Prudential and Colony Square Company ("Colony Square") have been given adequate notice of and an opportunity to present evidence and argument in connection with said Motion which this Court finds to be proper and sufficient under the circumstances.

3. This Court entered an "Order and Decree of Confirmation of Plan of Arrangement" on March 30, 1977 ("Confirmation Order") confirming the "Consolidated Plan of Arrangement proposed by The Prudential Insurance Company of America, as amended through February 15, 1977" ("Plan").

4. This Chapter XII Court expressly retained jurisdiction to enforce the Confirmation Order and

the Plan and, as provided in said Plan, this Court retained exclusive jurisdiction of the property of Colony Square which was leased to Prudential, to wit, the two office buildings, retail mall, parking lot and hotel located at Peachtree and 14th Streets in Atlanta, Georgia ("Colony Square Property") for the purpose of enforcing the provisions of the Plan with respect thereto (See Confirmation Order, subparagraph (f) at pp. 7-8).

5. At this Court's direction (See May 14, 1984 Order of this Court and subsequent notice resetting hearing for July 22, 1984 at 9:30 A.M.), a hearing was held before this Chapter XII Court on June 22, 1984, to consider Prudential's February 9, 1984 motion requesting that this Chapter XII Court enforce the Confirmation Order and require obedience by Colony Square to the provisions thereof and compliance by Colony with the Plan ("June 22 Hearing").

6. At the June 22 Hearing legal counsel for Colony Square advised this Court that an involuntary Chapter 7 (11 U.S.C. § 701 *et seq*) case was commenced against Colony Square on or about April 30, 1984, in the United States Bankruptcy Court for the Western District of Pennsylvania, which Chapter 7 had been subsequently converted to Chapter 11 and in which a Chapter 11 Plan had been filed (collectively "Chapter 11 Case").

7. At the June 22 Hearing this Court took judicial notice of the Chapter 11 Case; denied Colony Square's request that the June 22 Hearing not proceed; noted that any Section 362 (11 U.S.C. § 362) automatic stay arising by virtue of the Chapter 11 Case did not affect the exclusive jurisdiction of the Chapter XII Court with respect to Colony Square's debt to Prudential over which the Chapter XII Court retained exclusive

jurisdiction; and directed counsel to proceed with the hearing.

8. At the June 22 Hearing counsel for Colony Square noted that it might proceed in Pittsburgh, Pennsylvania on Monday, June 25, 1984, to seek a contempt citation against Prudential for proceeding with the June 22 Hearing;

9. This Court has been advised by legal counsel for Prudential that Prudential's counsel has been notified that a hearing, the precise purpose of which is unknown, has been scheduled in the Chapter 11 Case before The Honorable Joseph L. Cosetti, Bankruptcy Judge, United States Bankruptcy Court for the Western District of Pennsylvania for 11:30 A.M. on Monday, June 25, 1984.

As a conclusion of law, this Court concludes that there is ample authority for this Court to act in aid of and to protect its jurisdiction in this Chapter XII Case, Bankruptcy Act of 1898, as amended, § 2a(15) (former 11 U.S.C. § 11a(15)) and § 411 (former 11 U.S.C. § 811); All Writs Act, 28 U.S.C. § 1651; *Matter of Macon Uplands Venture,* 624 F.2d 26 (5th Cir. 1980), including authorities cited therein.

IT IS THEREFORE,

ORDERED, ADJUDGED AND DECREED that in aid of the exclusive jurisdiction as expressly retained by this Chapter XII Court and in order to protect same, Colony Square Company, a Georgia Limited Partnership, its partners, agents, attorneys, representatives and creditors should be and are hereby enjoined from:

1. Commencing or continuing any reorganization, liquidation, insolvency or other proceeding against or otherwise affecting the Colony Square Property or the

indebtedness of Colony Square Company to Prudential other than action taken in this Court or in the United States District Court for the Northern District of Georgia and/or in the federal appellate courts on appeal from this Chapter XII Court in connection with this Chapter XII Case or on appeal from the Memorandum Opinion of the Chapter 11 Court in Atlanta, entered March 26, 1984, dismissing the prior Chapter 11 Case.

2. Seeking to cite Prudential or its legal counsel for contempt or otherwise taking any action against Prudential, its officers, agents, employees or its legal counsel for proceeding in the June 22 Hearing in any court or forum other than this Chapter XII Court; provided that nothing contained herein shall prevent any appeals or requests for post-judgment relief by any party from any orders or judgments of this Court entered as a result of the June 22 Hearing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Order shall be served on Colony Square Company by legal counsel for Prudential (Alston & Bird) by delivering a copy to legal counsel for Colony Square Company in Atlanta (Powell, Goldstein, Frazer & Murphy).

IT IS SO ORDERED, ADJUDGED AND DECREED at Atlanta, Georgia at 10:15 o'clock A.M. this 25 day of June, 1984.

/s/ HUGH ROBINSON

HUGH ROBINSON
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

CASE NO. B75-3523A
Chapter XII

FILED IN U.S. BANKRUPTCY COURT
Atlanta, Georgia
MAY 14 1984
JOHNNY L. PRESSLEY, Clerk

OkDER

The above-referenced matter is before the court on a motion filed by Prudential Ins. Co. of America ("Prudential"), entitled "Motion For Relief From Stay, to Enforce Court Order and to Compel Debtor to Carry Out Arrangement." The debtor, ("CSC"), filed a response, including a counterclaim and a demand for jury trial,[1] followed by an amended response entitled "First Amended Response and Counterclaim of Colony Square Company to Prudential's Motion for Relief from Stay, to Enforce Court Order and to Compel Debtor to Carry Out Arrangement."

The debtor filed a Chapter XII petition on October 16, 1975. On March 30, 1977, this court confirmed a plan proposed by Prudential. The plan incorporated several documents, including a lease and a moratorium agreement. It provided that Prudential, as mortgagee, would go into possession of the Colony Square complex under a leasehold arrangement. Prudential would manage the

[1]CSC withdrew its demand for a jury trial on April 4, 1984.

property during the five year lease term, and if CSC failed to either bring the loan current or to pay the loan in full by January 1, 1982, Prudential was entitled to proceed with foreclosure or to demand a deed in lieu of foreclosure. (Moratorium Agreement, VIII, 8.01., Prudential Exhibit #3).

When CSC failed to make the necessary payments by January 1, 1982, Prudential gave notice of its desire to receive a deed in lieu of foreclosure. Prior to the tender of the deed, however, CSC filed a Chapter 11 petition in the Bankruptcy Court for the Western District of Pennsylvania, thereby staying any further action by Prudential to consummate the Confirmed Chapter XII plan.

The Chapter 11 case was ultimately transferred to this court, and on March 26, 1984, this court dismissed the debtor's Chapter 11 petition, including all adversary proceedings filed therein, for lack of subject matter jurisdiction. *Prudential Ins. Co. of America v. Colony Square Co. (In re Colony Square Co.),* No. 84-01325A Bank. N.D. Ga., March 26, 1984).[2] Thus, Prudential's motion for relief from stay in the Chapter 11 case is moot, and the limited issue before the court at this juncture is whether CSC's claims against Prudential can serve as an affirmative defense to Prudential's motion to compel compliance with the Chapter XII plan.

The dispute between the parties may be summarized as follows: Prudential argues that CSC should be compelled to comply with the terms of the plan by relinquishing a deed in lieu of foreclosure, and that any claims of CSC against Prudential must be maintained in a separate action. CSC argues that Prudential, as lessee and manager of the Colony Square complex, wilfully and negligently mismanaged the complex during the five year lease term,

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[2]This matter is presently on appeal to the district court.

thereby precluding CSC from obtaining the funds necessary to fulfill its repayment obligations under the plan, and excusing CSC from such repayment. CSC contends that Prudential's mismanagement of the property dissuaded other lenders from refinancing the loan prior to the January 1, 1982 due date.[3] It argues that the aforementioned allegations, if proved as affirmative defenses, will serve as a bar to Prudential's right to foreclose under the plan. Accordingly, CSC contends that the court must hear its claims regarding alleged violations under the lease prior to the enforcement of the plan.

A review of the lease reveals that Prudential acquired several rights and obligations under the leasehold arrangement with CSC, including *inter alia,* the right to enter into certain contracts and leases, if "consistent with good business practices," and the obligation to maintain proper books and accounting procedures. (Sections 5.1, and 11.1 of Lease, Prudential Exhibit #3).

CSC alleges several violations under the lease. As to the hotel alone, these violations include:

> (1) failure to post signs adequately directing the public to the hotel;
>
> (2) permitting the payroll costs of operating the Hotel to exceed, by at least One Million ($1,000,000.00) Dollars annually, the payroll costs needed to operate a hotel of its kind successfully;
>
> (3) failure to maintain sufficient control over the cost of supplies;
>
> (4) permitting the cost of advertising, sales and public relations to become excessively high;

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[3]The court notes that CSC has not alleged that it actually attempted to secure refinancing.

(5) failure to supervise, train and motivate the Hotel's staff in an adequate fashion;

(6) failure to provide adequate cleaning and housekeeping services;

(7) maintaining inadequate accounting reporting and control procedures;

(8) permitting the occupancy rate to be substantially below that of similar hotels in the Atlanta market;

(9) failure to market and promote the Hotel effectively and properly; and

(10) general mismanagement of the hotel

CSC also alleges that similar violations have occurred in relation to the management of the office buildings and shopping mall.

In determining whether CSC's mismanagement claims should serve as an affirmative defense to Prudential's remedy of foreclosure, the court has looked to whether the parties intended proper management as a prerequisite to CSC's duty to pay off the loan, and whether it would be equitable in this instance to permit CSC's claims to serve as a potential bar to Prudential's claim for relief.

After reviewing the lease and moratorium agreement, the court concludes that the covenant made by CSC to pay off the loan by January 1, 1982, is separate and distinct from Prudential's covenant regarding management of the property under the lease. The court further concludes that in light of CSC's dilatory conduct with respect to its alleged claims against Prudential, it would be inequitable to permit such claims to serve as a bar to Prudential's remedies under the plan.

The language of the moratorium agreement is clear. It states that if CSC does not bring current or pay off the loan on or before January 1, 1982, Prudential may either foreclose or demand a deed in lieu of foreclosure. The court finds no ambiguity in this language. Nothing in the language of the plan indicates that proper management by Prudential, in addition to default by CSC, is a prerequisite to Prudential's right to foreclose, and nothing in the language of the plan indicates that CSC was obligated to pay off the loan only if satisfied with Prudential's management. Accordingly, the court concludes that a claim of mismanagement under the lease should not serve as a bar to Prudential's right to foreclose under the moratorium agreement.

Furthermore, if Prudential failed to properly manage the property, CSC had rights and remedies under the lease. The lease was incorporated into the plan, and at any time during the leasehold period, CSC could have filed a motion in this court, as a Chapter XII court, alleging noncompliance with the terms of the lease. This court retained jurisdiction to supervise and enforce the mutual agreements between Prudential and CSC. (Consolidated Plan of Arrangement, paragraph IV (B)(2)), Prudential Exhibit #2.). At no time did CSC attempt to compel compliance with the lease.[4]

In addition, upon any default by Prudential under the lease, CSC had the obligation to give written notice and an

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[4]CSC cites *In re Atlas Service Center, Inc.* 384 F.2d 66 (5th Cir., 1967), for the proposition that the court must entertain CSC's excuses for nonperformance prior to enforcement of the plan. However, the *Atlas* court expressly held that . . . . [The president of the corpoate debtor] now candidly acknowledges that the first complaint ever made to the Court about this state of affairs [i.e. alleged mismanagement by the trustee] was in his answer to the show cause order issued by Judge Choate on August 27, 1966. Judge Fulton was therefore warranted in finding that this did not constitute a valid excuse for nonperformance of the Plan." *Id.* at 85.

opportunity to cure, or in some instances CSC could terminate the lease upon written notice to Prudential. (Section 15.1 of the Lease, Prudential Exhibit 3). At no time during the leasehold period did CSC exercise these remedies. Thus, Prudential had no opportunity to cure the alleged violations prior to learning from CSC that such violations were being asserted as a bar to foreclosure.

The court concludes that instead of pursuing its own remedies and fulfilling its own obligations under the plan during the five year lease term, CSC now seeks to preclude Prudential from enforcing its remedies under the moratorium agreement. Sitting as a court of equity, the court should not tolerate this result.

CSC suggests that it was in the best interests of Prudential to mismanage the property so that CSC would be unable to fulfill the terms of the contract by January 1, 1982. However, if the plan were indeed structured so as to encourage mismanagement, the court questions why CSC agreed to it, and why CSC tolerated Prudential's alleged egregious behavior until faced with the prospect of losing its property.

CSC has a separate claim for damages against Prudential for any alleged mismanagement under the lease. CSC argues that a remedy at law is inadequate because the Colony Square complex is unique. In its "Memorandum in Opposition to Prudential's Claim for Summary Relief," CSC states that "when CSC ultimately prevails on its management claims, if the deed has been tendered, CSC may be unable to retrieve or replace its property." Brief at 27-28. This argument presumes that success on the management claims will preclude enforcement of the plan. As previously stated, the court disagrees with this premise. CSC's claim for mismanagement is separate and distinct

from Prudential's remedies under the moratorium agreement.[5]

The request by CSC that the court entertain CSC's claims against Prudential in conjunction with Prudential's motion to enforce the plan is hereby denied. The court shall hold a hearing on Prudential's motion on Thursday, June 7, 1984 at 9:30 a.m. The court has set aside a full day to hear the motion.

SO ORDERED this 11 day of May, 1984, at Atlanta, Georgia.

/s/ HUGH ROBINSON
HUGH ROBINSON
UNITED STATES BANKRUPTCY
JUDGE

[5]The court also has serious misgivings about entertaining a common law damage claim for mismanagement in conjunction with a motion to compel compliance with a court order.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff,

v.

COLONY SQUARE COMPANY, Defendant.

C83-2503A

BANKRUPTCY NO. 84-01325A

MEMORANDUM OPINION

This matter is before the court on a pending Motion to Dismiss filed by Prudential Insuance Company of America ("Prudential"). Prudential seeks to dismiss a Chapter 11 petition filed by Colony Square Corporation ("CSC") in the bankruptcy court of Pennsylvania.

FINDINGS OF FACT

Prior to 1975, Prudential loaned large sums of money to CSC for the construction of a complex called "Colony Square". The complex consists of a hotel, condominiums, retail stores and office space located in Atlanta, Georgia. Under a Promissory Note and Deed to Secure Debt, the Colony Square complex served as collateral for Prudential's loan. CSC was unable to fulfill its obligations under the note, and on October 16, 1975, it filed a Chapter XII petition under former Bankruptcy Act of 1898. The petition was filed in the bankruptcy court for the Northern District of Georgia, and on March 30, 1977, this court confirmed a Consolidated Plan of Arrangement proposed by Prudential.

The order of confirmation at paragraph (f), provided as follows:

> This Court shall retain jurisdiction to enforce this Order and the Plan .... This Court shall, as provided in the Plan, retain exclusive jurisdiction of the debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto.

The plan itself, at paragraph IV(B)(2), further provided that:

> "Following confirmation, the Court will ... (ii) retain exclusive jurisdiction over the Remaining Property to supervise and enforce the compliance by CSC and Prudential with their agreements with each other...."

The plan, as it pertained to Prudential, provided that Prudential, as mortgagee, would go into possession of its collateral under a leasehold arrangement. During the five year lease term, Prudential was precluded from foreclosing upon the property if CSC made annual contributions to offset operating costs. Furthermore, beginning in the year 1978, CSC could regain possession of the Colony Square complex by either bringing the loan fully current and reimbursing Prudential for certain expenses, or by paying the loan in full. If CSC failed to exercise one of these options prior to December 30, 1981, Prudential was entitled to either proceed with foreclosure or to demand a deed in lieu of foreclosure.

It is undisputed that CSC failed to bring the loan current or to pay it off by December 30, 1981. In addition, CSC failed to make the 1981 annual contribution for operating expenses. Thus, on January 8, 1983, pursuant to its rights under the plan, Prudential gave notice to CSC of its desire to receive a deed in lieu of foreclosure.

The tender of the deed in lieu of foreclosure was arranged to occur on January 29, 1983. On January 28, 1983, however, CSC filed a Chapter 11 petition under the Bankruptcy Code of 1978 in the Bankruptcy Court for the Western District of Pennsylvania. Since the automatic stay of 11 U.S.C. § 362 is invoked upon the filing of a petition, Prudential was precluded from further attempts to effectuate the Chapter XII plan, and the proposed transfer of the deed in lieu of foreclosure was not consummated.

Prudential filed a motion in the Bankruptcy Court of Pennsylvania, requesting the court to dismiss CSC's Chapter 11 petition. In the alternative, Prudential requested limited abstention or a change of venue. Prudential argued, inter alia, that this court's retention of jurisdiction to enforce the Chapter XII plan precluded CSC from filing a second bankruptcy petition. The bankruptcy court held, however, that jurisdiction over the Chapter 11 case was proper because, pursuant to Section 14(c)(5) of the Bankruptcy Act,[1] six years had elapsed since CSC's original filing under Chapter XII. According to the Chapter 11 Bankruptcy Court in Pennsylvania, the Chapter XII court's attempt to "wet nurse" the parties could not foreclose the debtor's right to refile after the passage of six years.

Prudential appealed this decision to the District Court for the Western District of Pennsylvania. That court rejected the bankruptcy court's "wet nursing" argument and suggested that the Chapter XII case was still properly pending in the Chapter XII court. Citing *Freshman v. Atkins* 269 U.S. 121, 46 S.Ct. 41, 70 L. Ed. 193 (1925) the District court stated that the pendency of one bankruptcy case precludes consideration of a second petition which purports to deal with the same debts. Rather than dismiss the action, however, the district court held that the proper

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[1] 11 U.S.C. § 32(c)(5)(1976).

course of action was to transfer that part of the case which dealt with the debt to Prudential to the Bankruptcy Court where the Chapter XII case was still pending. The case was ultimately transferred to the District Court for the Northern District of Georgia, which, pursuant to Emergency Rule (c), referred the case to this court. Prudential's Motion to Dismiss, therefore, is currently pending before the court.

On March 15, 1984 the court held a hearing to determine whether jurisdiction over the debtor's Chapter 11 petition was properly vested in this or any other court.[2] Although this court is not bound by either of the aforesaid opinions, an independent review of the facts and the law has persuaded the court that the debtor's Chapter 11 petition is improper and should be dismissed.

CONCLUSIONS OF LAW

The clear weight of authority in this country holds that if a bankruptcy action is pending, a subsequent action which purports to affect the same debt cannot be maintained. *Freshman v. Atkins,* 269 U.S. 121, 46 S.Ct. 41, 70 L. Ed. 193 (1925), *Matter of Macon Uplands Venture,* 624 F.2d 26 (5th Cir. 1980). *In re Stahl, Asano, Shigetomi & Assoc.* 7 B.R. 181 (Bankr. D. Haw. 1980). *See also Central Trust Co. v. Official Creditor's Committee* 454 U.S. 354, 102 S.Ct. 695, 70 L. Ed. 2d 542 (1982), *In re Eagson Corp.,* 1 B.R. 777 (Bankr. E.D. Penn., 1980). *Matter of Macon Uplands Venture,* 6 BCD 1175 (Bankr. M.D. Ga., 1980).

The above-cited proposition stems from well-established notions of orderly administration of justice, the

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[2]The court heard a full day of argument from CSC and Prudential on this issue. In addition, the Committee of Holders of Partnership Interests, a committee created by the Pennsylvania Bankruptcy Court, submitted briefs and presented oral argument as to why the Chapter 11 case should not be dismissed. Reference to an argument of CSC may also refer to an argument advanced by the Committee.

court's inherent right to protect its own jurisdiction, and the court's duty to preclude, where possible, an abuse of the bankruptcy laws.

In *Freshman v. Atkins, supra,* the Supreme Court held that where an application for discharge is pending in the bankruptcy court, the court on its own motion can refuse a second application for discharge, since "the law will not tolerate two suits at the same time for the same cause." *Id.* at 123. The Supreme Court stated: "Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine,* so flagrant an attempt to circumvent its decrees." *Id.* at 124 (quoting *In re Fiegenbaum,* 121 F. 69, 70 (2nd Cir. 1903)).

An analogous situation exists in the present case. Circa 1977, CSC and Prudential agreed upon the proper treatment and repayment of the Prudential debt. That settlement was embodied in the Chapter XII plan and approved by order of this court. We retained jurisdiction to enforce the confirmed plan.

By filing a subsequent bankruptcy petition, CSC now seeks to thwart the operation of the unconsummated plan, and to relitigate the issue of how the Prudential debt should be treated in bankruptcy. That issue has already been resolved, and CSC is bound by the terms of its agreement. *See Freshman v. Atkins supra; Matter of Springpark Assoc.* 623 F.2d 1377 (9th Cir. 1980). The court should not sanction an attempt to circumvent the terms of a binding, confirmed plan. To do so would make a mockery of this court's jurisdiction.

The debtor's Chapter XII action is still pending in this court. The plan has not been consummated, and the court has retained jurisdiction to enforce it. No final decree has been entered, and the Chapter XII files have not been

closed. We can see no reason to allow a simultaneous Chapter 11 case to proceed. In fact, the mere possibility that a court will be forced to entertain simultaneous bankruptcy cases has been held to warrant the dismissal of a second petition. In *In re Stahl, Asano, Shigetomi & Assoc., supra,* a bankruptcy court held that it could sua sponte dismiss a Chapter 11 petition where an appeal of a Chapter XII dismissal was pending. The court reasoned that if the district court reversed its dismissal of the Chapter XII case, it would be forced to entertain two bankruptcy cases which dealt with the same debts.

Under our facts, allowing the Chapter 11 case to proceed would place this court in an awkward predicament. We would be requested as a Chapter XII court to enforce the unconsummated plan, but we would be admonished as a Chapter 11 court that such relief would result in a violation of the automatic stay. Each voice would speak with equal force and validity, since both cases would properly be before the court. We deem it to be within our inherent powers to preclude such an absurd result. *Freshman v. Atkins, In re Stahl, Asano, Shigetomi & Assoc., supra.*

CSC argues that this court can not properly retain jurisdiction to enforce the plan and that the Chapter XII case is therefore not "pending" within the meaning of *Freshman v. Atkins* and the other cases cited above. However, CSC agreed, in the plan itself, to the court's retention of jurisdiction. The court's reservation of jurisdiction was as much for CSC's protection as for the protection of Prudential. Thus, we agree with the Pennsylvania District Court that such retention is not improper. *See Prudential Ins. Co. v. Colony Square Co.,* 29 B.R. 432 (D.C. W.D. Penn., 1983)

CSC advances several other contentions which we reject as without merit. The most cogent of these arguments, however, warrants a brief discussion. CSC argues

that in determining whether the CSC Chapter 11 petition has been properly filed, this court must look solely to the objective criteria of Section 14(c)(5) of the Bankruptcy Act, 11 U.S.C. § 32(c)(5)(1976).[3] This section states that:

> (c) The Court shall grant the discharge unless satisfied that the bankrupt has... (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy has been granted a discharge, or had a composition or an arrangement by way of composition or a wage earners plan by way of composition confirmed under this title; ....

CSC therefore contends that it may file a new petition every six years, without fear of constraint by this or any other court.

We hesitate to give the statute such a sanitized interpretation. Surely Congress did not contemplate a debtor's unfettered right to refile every six years, even if a bankruptcy case involving the same debt is still pending. As stated by the court in *Stahl, supra,*

> "While the plain language of a statute is the best indication of legislative purpose, it is well settled that a court must look beyond the plain meaning of the statute if the plain meaning would lead to absurd or futile results. *Stahl* at 186.[4]

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[3]The Bankruptcy Code contains language that is virtually identical to that of Section 14(c)(5) of the Act. See 11 U.S.C. § 727(a)(8).

[4]The issue before the *Stahl* court was the proper interpretation of 11 US.C. § 1112(b), which states that a court may dismiss or convert a case upon "request of a party in interest." The *Stahl* court held that such language should not be interpreted to preclude the court from exercising its inherent right to dismiss a case *sua sponte,* since such an interpretation would leave the court powerless to protect its own jurisdiction. Similarly, the language of Bankruptcy Act Section 14(c)(5) should not be interpreted to preclude the court from dismissing a second bankruptcy

(Continued on next page)

Thus, we hold that Section 14(c)(5) of the Bankruptcy Act does not preclude dismissal of this case. We further hold that the debtor's receipt of a discharge upon confirmation of the Chapter XII plan does not strip the case of its "pending" nature. This court explicitly retained jurisdiction to ensure consummation of the plan. The plan is as yet unconsummated and the files have not yet been closed. The Chapter XII case is "pending" in this court. Thus, a subsequent Chapter 11 case, purporting to deal with the same debts, is improper and can not be maintained.

The Chapter 11 case is hereby dismissed for lack of subject matter jurisdiction. All adversary proceedings filed within the Chapter 11 are also dismissed, without prejudice to the parties.

SO ORDERED at Atlanta, Georgia this 23 day of March, 1984.

/s/ HUGH ROBINSON
HUGH ROBINSON
UNITED STATES BANKRUPTCY
JUDGE

(Continued)
petition if a prior case dealing with the same debt is still pending. Construction of the section in a vacuum, without consideration of a prior pending case, would force the court to simultaneously administer multiple cases involving the same debts. Such is the 'absurd result' envisioned by the court in *Stahl. See Prudential Ins. Co. v. Colony Square Co., Supra,* at 438, n. 12.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5319

THE PRUDENTIAL INSURANCE CO. OF AMERICA

v.

COLONY SQUARE COMPANY, (Debtor),
COMMITTEE OF HOLDERS OF
PARTNERSHIP INTERESTS,
COMMITTEE FOR UNSECURED CREDITORS

Colony Square Company, Debtor
and Committee of Holders of Partnership Interest,
Appellants

On Appeal From the United States District Court
for the Western District of Pennsylvania

(D.C. Civil No. 82-1282)
District Judge: Hon. Alan N. Bloch

Submitted Under Third Circuit Rule 12(6)
December 2, 1983
Before: GIBBONS and SLOVITER, *Circuit Judges*
and GREEN, *District Judge**

(Filed:)

MEMORANDUM OPINION OF THE COURT

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*Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

GIBBONS, *Circuit Judge*:

Colony Square Company, Debtor, appeals pursuant to 28 U.S.C. § 1293(b) (Supp. V. 1981) an order of the district court reversing a decision of the bankruptcy court and directing it to transfer to the Northern District of Georgia proceedings involving a debt to Prudential Insurance Company. The district court ordered transfer pursuant to 28 U.S.C. § 1475 (Supp. V. 1981), which is closely analogous to a transfer pursuant to 28 U.S.C. § 1404(a) (1976). Section 1293(b) permits appeals only from final judgments. It is settled in this circuit that a transfer order pursuant to 28 U.S.C. § 1404(a) (1976) is not a final judgment. *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952). That authority controls. Thus the appeal will be dismissed for lack of jurisdiction.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ JOHN J. GIBBONS
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

COLONY SQUARE COMPANY, Debtor.

Misc. No. 10322
Bankruptcy No. 82-254

COLONY SQUARE COMPANY, Plaintiff,

vs.

FAIRMONT HOTEL COMPANY, Defendant.

Adversary No. 82-419

COLONY SQUARE COMPANY, Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant.

Adversary No. 83-914

COLONY SQUARE COMPANY, Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant.

Adversary No. 83-1476

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant,

vs.

COLONY SQUARE COMPANY, Debtor,

vs.

COMMITTEE OF HOLDERS OF PARTNERSHIP INTEREST AND COMMITTEE FOR UNSECURED CREDITORS, Appellees.

Civil Action No. 82-1282

ORDER

AND NOW, this 9th day of November, 1983, in accordance with this Court's Opinion and Order of April 18, 1983 (*In re Prudential Insurance Company of America v. Colony Square, et. al.*, C.A. No. 82-1282), and pursuant to 28 U.S.C. § 1404,

IT IS HEREBY ORDERED that that part of *In re Colony Square Company*, Bankruptcy No. 82-254 (W.D. Pa.) involving the debtor's debt to the Prudential Insurance Company of America is transferred to the United States District Court for the Northern District of Georgia (Atlanta Division), which retains jurisdiction over this matter (*see In re Prudential Insurance Company of America v. Colony Square, et. al.*, C.A. No. 82-1282, pp. 7-9 (W.D. Pa.)) at Case No. B75-3523A (N.D. Ga.), assigned to United States Bankruptcy Judge H. Robinson, Jr., of the United States Bankruptcy Court for the Northern District of Georgia.

IT IS FURTHER ORDERED that the Clerk shall send the entire Court file of Bankruptcy No. 82-254 to the transferee Court, but in sending said file, the Clerk must retain those original copies of Bankruptcy No. 82-254 that are contained in this Court's file at C.A. 82-1282, which is presently on appeal to the United States Court of Appeals for the Third Circuit. The Clerk shall send certified copies in lieu of those original copies to the transferee Court.

Said transfer to occur forthwith.

/s/ ALAN N. BLOCH
United States District Judge

cc: Michael J. Yurcheshen, Esquire
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

COLONY SQUARE COMPANY, Debtor.

Misc. No. 10322
Bankruptcy No. 82-254

COLONY SQUARE COMPANY, Plaintiff,

vs.

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COLONY SQUARE COMPANY, Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant.

Adversary No. 83-914

COLONY SQUARE COMPANY, Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant.

Adversary No. 83-1476

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant,

vs.

COLONY SQUARE COMPANY, Debtor,

vs.

COMMITTEE OF HOLDERS OF PARTNERSHIP INTEREST AND COMMITTEE FOR UNSECURED CREDITORS, Appellees.

Civil Action No. 82-1282

ORDER

AND NOW, this 9th day of November, 1983, after ordering the transfer of that part of *In re Colony Square Company,* Bankruptcy No. 82-254 (W.D. Pa.), involving the debtor's debt to the Prudential Insurance Company of America, to the United States District Court for the Northern District of Georgia by Order dated November 9, 1983, and upon consideration of this Court's own motion to transfer the remainder of Bankruptcy No. 82-254 and the parties' responses to that motion, and pursuant to 28 U.S.C. § 1404,

IT IS HEREBY ORDERED that the remainder of Bankruptcy No. 82-254, including all adversary proceedings filed therein, is transferred to the United States District Court for the Northern District of Georgia (Atlanta Division), as related to *In re Colony Square Company,* Case No. B75-3523A (N.D. Ga.), which is assigned to United States Bankruptcy Judge H. Robinson, Jr., of the United States Bankruptcy Court for the Northern District of Georgia.

IT IS FURTHER ORDERED that the Clerk shall send the entire Court file of Bankruptcy No. 82-254 to the transferee Court, but in sending said file, the Clerk must retain those original copies of Bankruptcy No. 82-254 that are contained in this Court's file at C.A. 82-1282, which is presently on appeal to the United States Court of Appeals for the Third Circuit. The Clerk shall send certified copies in lieu of those original copies to the transferee Court.

Said transfer to occur forthwith.

/s/ ALAN N. BLOCH

United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant,

vs.

COLONY SQUARE COMPANY, Debtor.

COMMITTEE OF HOLDERS OF PARTNERSHIP INTERESTS and COMMITTEE FOR UNSECURED CREDITORS, Appellees.

Civil Action No. 82-1282

MEMORANDUM OPINION

BLOCH, District J.

This is an appeal from the United States Bankruptcy Court for the Western District of Pennsylvania. On January 28, 1982, the debtor/appellee, Colony Square Company, filed a petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Western District of Pennsylvania. Shortly thereafter, on February 24, 1983, appellant, the Prudential Insurance Company of America (hereinafter referred to as "Prudential"), filed a motion to dismiss the debtor's petition for lack of jurisdiction, for want of good faith, for violation of the doctrine of laches, and on the grounds of abstention, and in the alternative, for a change of venue. The Bankruptcy Court denied said motion, and Prudential has filed this appeal from the denial of its motion.

In passing on an appeal from the Bankruptcy Court, the district court must accept the Bankruptcy Judge's findings of fact, unless those findings are clearly erroneous. Rule of Bankruptcy Procedure 810; *In re Hollock,* 1 B.R. 212, 215 (M.D. Pa. 1979). After reviewing the record in this case, the Court finds that the Bankruptcy Judge's factfindings are not clearly erroneous. The facts, as established by the Bankruptcy Court in this case, follow.

> "Colony filed a Petition for Relief under Chapter XII of the former Bankruptcy Act on October 16, 1975. This petition was filed in the United States Bankruptcy Court for the Northern District of Georgia. A Consolidated Plan of Arrangement ("Plan") was confirmed in that case by an Order signed by Judge Robinson on March 30,1977. The Plan was proposed by Prudential, the largest secured creditor of Colony.
>
> Paragraph (f) of the Confirmation Order reads, in pertinent part, as follows:
>
> > This Court shall retain jurisdiction to enforce this Order and the Plan. . . .This Court shall, as provided in the Plan, retain exclusive jurisdiction of the debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto.
>
> The Plan provided, *inter alia,* with respect to Prudential that:
>
> > When the Plan was confirmed on March 30, 1977 by the Atlanta Court, CSC's and Prudential's relationship of borrower and lender were reaffirmed, and Prudential went into possession of the collateral under a five-year lease subject to two one-year renewals. Prudential could not foreclose or exercise other remedies as a lender during the initial term if CSC did not default on its sole

> obligation, which was to make annual contributions to offset certain operating costs. Beginning in 1978, CSC could regain possesion by paying Prudential off or by bringing Prudential current, and making certain other payments, during the last 90 days (excepting New Year's Eve) of each year, including 1981. Prudential's Memorandum in Support at page 2.

CSC failed to make payments to Prudential by year end 1981, either to pay off the indebtedness or bring Prudential current. Neither had CSC in 1981 made the annual contribution to operating costs. Paragraph 111(B)(4) of the Plan provides:

> CSC shall have the right to bring its indebtedness to Prudential current or pay the same in full as set forth therein, failing which CSC shall comply with its obligations to convey to Prudential all of its right, title and interest in and to the remaining property in return for the cancellation of CSC's indebtedness to Prudential.

The amount owing to Prudential at the end of 1981 was approximately 90 million dollars.

On January 26, 1982 CSC filed its Petition for Relief under Chapter 11 of the Bankruptcy Code in the Western District of Pennsylvania. This filing action automatically caused a stay of any attempt by Prudential to enforce its rights without permission of the Court. The Motion to Dismiss questions CSC's right to file a Chapter 11 Petition in this Court or elsewhere."[1]

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[1]Although the Court finds no error in, and adopts, these facts, it also sets forth several additional facts, at a later point in this Opinion, that are important to the rationale of this decision.

In re Colony Square Company, Bankruptcy No. 82-254, pp. 1-3 (W.D. Pa. May 10, 1982) (docket entry No. 22 of record on appeal). Although the district court must accept the Bankruptcy Court's findings of fact unless they are clearly erroneous, the clearly erroneous standard does not apply to the Bankruptcy Court's conclusions of law; that is, the reviewing court must make an independent determination on the legal issues. *In re Holock,* 1 B.R. at 215. The Bankruptcy Court denied Prudential's motion for the following reasons: (1) the Bankruptcy Court did not lack jurisdiction to entertain the debtor's petition; (2) the petition was not filed in bad faith; (3) the doctrine of laches did not warrant dismissal of the petition; (4) abstention was not proper in this case; and (5) the Bankruptcy Court for the Western District of Pennsylvania was the proper venue for the action. After careful review of the record, this Court finds that the Bankruptcy Court's decision was contrary to law and should be reversed and remanded for further proceedings consistent with this Opinion.

The major thrust of the Bankruptcy Court's decision was contained in its discussion of Prudential's assertion of lack of jurisdiction.[2] First, the Bankruptcy Court cited § 14(c)(5) of the Bankruptcy Act of 1898, 11 U.S.C. § 32(c)(5)(1976),[3] which states as follows:

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[2]Eleven of the 14 pages of the Opinion were devoted to this argument. The other three pages served to summarily dispose of the other four arguments.

[3]The Bankruptcy Court relied upon the Bankruptcy Act of 1898 because the debtor's previous petition filed in the Georgia Bankruptcy Court was filed under Chapter XII of the Bankruptcy Act of 1898. In light of the fact that the petition filed in the Bankruptcy Court for the Western District of Pennsylvania was filed under the Bankruptcy Reform Act of 1978, the Court questions why the Bankruptcy Court did not rely upon 11 U.S.C. § 727(a)(8), which is the successor to § 14(c)(5). Nevertheless, because the two provisions are virtually identical and because this determination is not critical in light of this Court's rationale set forth *infra,* the Court does not engage in a lengthy discussion of

(Continued on next page)

> (c) The Court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy has been granted a discharge, or had a composition or an arrangement by way of composition or a wage earners plan by way of composition confirmed under this title; . . . .

The Bankruptcy Court found that six years elapsed between the filing of the first petition in the Bankruptcy Court for the Northern District of Georgia (filed on October 16, 1975) and the filing of the petition in the Bankruptcy Court for the Western District of Pennsylvania (filed on January 26, 1982). Accordingly, relying on § 14(c)(5), the Bankruptcy Court determined that there is nothing to prevent such a refiling.[4]

Second, the Bankruptcy Court held that the Georgia Bankruptcy Court's retention of exclusive jurisdiction over the debtor's property leased to Prudential for purposes of enforcement[5] does not preclude the filing of the January, 1982 petition filed in the Bankruptcy Court for the Western District of Pennsylvania. The Bankruptcy Court cited § 476 of the Bankruptcy Act of 1898, 11 U.S.C. § 876 (1976), which provides, in pertinent part, as follows:

(Continued)
the propriety of the Bankruptcy Court's reliance on the provision of the Bankruptcy Act of 1898.

[4]The Bankruptcy Court did not discuss or refer to the fact that both bankruptcies involved the same debt.

[5]This retention of jurisdiction is set forth in subsection (f) of the Order and Decree of Confirmation of Plan of Arrangement of the Bankruptcy Court for the Northern District of Georgia, dated March 30, 1977. Exhibit "A" to Prudential's motion to dismiss for lack of jurisdiction or, in the alternative, for change of venue (docket entry No. 9 of the record on appeal).

> The confirmation of an arrangement shall discharge a debtor from his debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangment, ...

After acknowledging § 476 and the presence of the retention of jurisdiction by the Georgia Bankruptcy Court, the Bankruptcy Court attempted to dispel § 476's applicability to this case by stating that "what is at issue now is not enforcement of the Plan but the fact of a new filing." *In re Colony Square Company,* Bankruptcy No. 82-254, p. 5 (W.D. Pa. May 10, 1982) (docket entry No. 22 of the record on appeal). Moreover, the Bankruptcy Court construed the provisions of the Order and Decree of Confirmation of Plan of Arrangement of the Georgia Bankruptcy Court, found that the 1975 case filed in the Georgia Bankruptcy Court could not be under that Court's protection indefinitely, and held that a Court should not attempt to "wet nurse"[6] a company during and after reorganization. *Id.* at 5-7.

This Court disagrees with the Bankruptcy Court's determinations. To set the stage for its rationale, the Court adds the following facts from the record to those already established by the Bankruptcy Court. Sometime prior to 1975, the debtor acquired land, in Atlanta, Georgia, for the purpose of constructing a complex, which contains office buildings, a hotel, apartments, and retail shops and which is known as "Colony Square." Prudential loaned the debtor a substantial sum of money in connection with Colony Square, evidenced by a promissory note and a "Deed to Secure Debt and Security Agreement," under

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[6]This term is taken from the Second Circuit opinion in *In re Flatbush Ave.-Nevins St. Corp.,* 133 F.2d 760 (2d Cir. 1943). In that opinion, the Second Circuit stated that "Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . have power to remain a *wet nurse* to the reorganized company." *Id.* at 762 (emphasis added).

which Colony Square was conveyed to Prudential as collateral. The debtor was unable to meet its obligations as they came due and petitioned the Georgia Bankruptcy Court for an arrangement with its creditors under Chapter XII of the Bankruptcy Act of 1898.[7] The Georgia Bankruptcy Court signed an order, dated March 30, 1977, which served to reaffirm Prudential's and the debtor's relationship as lender and borrower. Under the arrangement, Prudential went into possession of the property under a 5-year lease and could not foreclose or exercise other remedies during the lease term, provided that the debtor did not default on its sole obligation of making annual contributions to offset operating costs. Moreover, commencing in 1978, the debtor could regain possession by paying Prudential the outstanding loan amount or, at least, bringing the loan current and by making certain other payments during the last 90 days of each year, 1978-1981. By the end of 1981, the debtor neither paid off the outstanding amount nor brought the loan current. Further, the debtor failed to make the annual contributions for operating expenses for 1981. Under the terms of the plan confirmed by the Georgia Bankruptcy Court in 1977, failure of the debtor to comply with its obligations is to result in the debtor's conveying of all of its right, title, and interest in Colony Square in return for cancellation of the indebtedness to Prudential. *In re Colony Square,* Bankruptcy No. 82-254, p. 2 (W.D. Pa. May 10, 1982) (docket entry No. 22 of the record on appeal); Exhibit "C" to Prudential's Motion to Dismiss, III(B)(4), pp. 9-10 (docket entry No. 9 of the

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[7]The Court finds that these facts are agreed upon in that both parties set them forth in their briefs. Moreover, these facts can be ascertained from a careful reading of the Consolidated Plan of Arrangement Proposed by the Prudential Insurance Company of America and confirmed by the Georgia Bankruptcy Court. Exhibit "C" to Prudential's motion to dismiss or, in the alternative, for a change of venue (docket entry No. 9 of the record on appeal).

record on appeal). Only 28 days[8] after it had defaulted on its obligation under the 1977 plan, January 28, 1983, and while the Georgia Bankruptcy Court retained jurisdiction to enforce the plan, the debtor filed a bankruptcy petition in the Bankruptcy Court for the Western District of Pennsylvania, listing the Prudential debt in its petition. Statement of Financial Affairs for Debtor Engaged in Business (docket entry No. 3 of the record on appeal).

With these facts in mind, the Court looks to the United States Supreme Court case of *Freshman v. Atkins*, 269 U.S. 118 (1925). In *Freshman*, the Supreme Court held that the pendency of a voluntary petition in bankruptcy precludes consideration of a second voluntary petition in connection with the same debts. *Id.* at 122. *See Prudential Loan and Finance Co. v. Robarts*, 52 F.2d 918, 919 (5th Cir. 1931). Although the *Freshman* decision is rather old, it is still good law and has been relied upon in a recent bankruptcy case involving an analogous situation. *In re Stahl, Asano, Shigetomi Associates*, 6 B.R. 232 (D. Hawaii 1980).[9]

This Court believes that the record reveals that the Chapter XII bankruptcy action filed by the debtor in the Bankruptcy Court for the Northern District of Georgia in 1975 is still pending, particularly in connection with the Prudential debt. Specifically, the Court points to the Order and Decree of Confirmation of Plan of Arrangement

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[8]The debtor failed to fulfill its obligations as required by December 31, 1981, and filed the bankruptcy proceeding in the Bankruptcy Court for the Western District of Pennsylvania on January 28, 1982.

[9]In the *Stahl* case, the debtors commenced a proceeding for voluntary bankruptcy under Chapter 11 of the Bankruptcy Reform Act of 1978. The Bankruptcy Court held that the proceeding for voluntary bankruptcy under Chapter 11 could not be maintained while an appeal from an earlier proceeding by the same parties under Chapter XII of the Bankruptcy Act of 1898 was still pending. The Bankruptcy Court, relying on the *Freshman* decision, held that the action could not be maintained while the earlier bankruptcy was still pending.

signed by the Bankruptcy Judge on March 30, 1977, which states, in pertinent part, at subsection (f) of the Order as follows:

> This Court shall retain jurisdiction to enforce this Order and the Plan,. . . .This Court shall, as provided in the Plan, retain exclusive jurisdiction of the debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto.

Exhibit "A" to the motion to dismiss or, in the alternative, for a change of venue, pp. 7-8 (docket entry No. 9 of record on appeal). The Court is cognizant of the fact § 476 of the Bankruptcy Act of 1898 states that the confirmation of an arrangement discharges a debtor; however, that same section provides for an exception to discharge if the arrangement so provided. As set forth above in the March 30, 1977 Order, the Georgia Bankruptcy Court retained jurisdiction of the property to enforce the provisions of the plan. The court rejects the Bankruptcy Court's wet-nursing argument because it must be kept in mind that a bankruptcy action, and any plan of arrangement that results therefrom, are intended to protect the creditors as well as the debtor. The Bankruptcy Court's first contention in connection with its wet-nursing argument was totally incorrect. That is, at page 5 of its opinion, the Bankruptcy Court stated that the parties did not vote for a provision providing for the retention of jurisdiction, that there was no provision for the retention of jurisdiction in the plan proposed to the Court for confirmation, and that the Georgia Bankruptcy Court inserted the retention of jurisdiction provision on its own initiative. *In re Colony Square Company,* Bankruptcy No. 82-254, p. 5 (W.D. Pa. May 10, 1982) (docket entry No. 22 of record on appeal). Based upon these assertions, the Bankruptcy Court questions the Georgia Bankruptcy Court's attempt to wet nurse the debtor. *Id.* The truth of the matter is that the plan did propose the

retention of jurisdiction at IV(B)(2).[10] Exhibit "C" to Prudential's motion to dismiss or, in the alternative, for change of venue, p. 15 (docket entry No. 9 of the record on appeal). Both parties had a substantial interest in the property, and, in light of the fact that the retention of jurisdiction provision was contained in the plan, as well as the order, it is apparent that each party desired the provision to protect its interest. In essence, the retention of jurisdiction was not an attempt by the Court to wet nurse any particular party. Moreover, Exhibit "B" to Prudential's motion is a certificate from the Clerk of the United States Bankruptcy Court for the Northern District of Georgia, certifying that no final decree has been issued in the 1975 case and that it is still open on that Court's records. Exhibit "B" to Prudential's motion to dismiss or, in the alternative, for a change of venue (docket entry No. 9 of the record on appeal). Thus, although the Bankruptcy Court for the Northern District of Georgia confirmed a plan of arrangement for the debtor in 1977, the aforementioned entries in the record give the appearance that the bankruptcy is still pending in that Court. The Supreme Court's decision in *Freshman* mandates that when a bankruptcy action is pending, a bankruptcy court cannot entertain or consider a second petition involving the same debts.

Rather than dismiss the action, this Court believes that the proper thing to do here is to transfer that part of this proceeding involving the debtor's debt to Prudential to the Bankruptcy Court for the Northern District of Georgia, where the 1975 bankruptcy is still pending. This transfer is ordered in accordance with 28 U.S.C. § 1475, which provides as follows:

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[10]That section stated, in pertinent part, as follows: "Following confirmation, the Court will . . . (ii) retain exclusive jurisdiction over the Remaining Property to supervise and enforce the compliance by CSC and Prudential with their agreements with each others. . . ."

> A bankruptcy court may transfer a case under Title 11 or a proceeding arising or related to such a case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties.

In accordance with § 1475, this Court believes that the interests of justice will be served by permitting the Bankruptcy Court for the Northern District of Georgia to make a determination on Prudential's motion in light of the fact that the 1982 petition involves the same debt as the 1975 petition that was filed in that Court.[11] Accordingly, the Order of the Bankruptcy Court is reversed, and the case is remanded for proceedings consistent with this Opinion.[12]

An appropriate Order will be issued.

Date: 4/18/83 /s/ A. N. BLOCH
United States District Judge

cc: Counsel of record.

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[11]Aside from the fact that the same debt is involved, the Court also notes that the property which is the subject of the debt is located within the jurisdiction of the Bankruptcy Court for the Northern District of Georgia.

[12]As a postscript, the Court adds one final criticism of the Bankruptcy Court's opinion. The Bankruptcy Court's rationale can be interpreted to mean that a debtor can file a bankruptcy petition every six years, regardless of the circumstances. The Court disagrees with this position in light of the Congressional intention to prevent the creation of class of debtors who repeatedly attempt to escape their obligations through a number of bankruptcies. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 399 (1966). The Court acknowledges that 11 U.S.C. § 727(a)(8) prohibits the filing of bankruptcy within a 6-year period and that once that 6-year period has expired, a debtor is again eligible for bankruptcy; however, the law presented by the *Freshman* case and other similar circumstances indicate that it is not a hard-and-fast rule that a debtor may refile for bankruptcy every six years. The Court believes that the Bankruptcy Court must consider such things as the pendency of another bankruptcy in permitting a refiling.

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U.S. Bankruptcy Judge Joseph L. Cosetti
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant,

vs.

COLONY SQUARE COMPANY, Debtor.

COMMITTEE OF HOLDERS OF PARTNERSHIP INTERESTS and COMMITTEE FOR UNSECURED CREDITORS, Appellees.

Civil Action No. 82-1282

JUDGMENT ORDER

AND NOW, this 18th day of April, 1983, upon consideration of Appellant's appeal from the Bankruptcy Court's Order of May 10, 1982, which was filed in the Bankruptcy Court on May 20, 1982, and docketed in this Court on July 2, 1982,

IT IS HEREBY ORDERED that the Order of the Bankruptcy Court is REVERSED, and the case is REMANDED to the Bankruptcy Court for further proceedings consistent with this Court's Opinion rendered this date.

/s/ A. N. BLOCH
United States District Judge

cc: Michael J. Yurcheshen, Esquire
Suite 4000, 309 Smithfield Street,
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Henry T. Reath, Esquire
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IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

COLONY SQUARE COMPANY, Debtor.

Bankruptcy No. 84-0984.

ORDER OF COURT

The Debtor in Possession and the Committee of Holders of Partnership Interests bring an action entitled Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. This matter came on quickly for an emergency hearing early on Monday, June 25, 1984 at 8:00 A.M. Later in the morning at about 11:00 A.M., Prudential, a secured creditor, informed the Court of an Order entered by the Bankruptcy Court in Atlanta styled as an order in aid of jurisdiction.

This Court declines to issue a Temporary Restraining Order or a Preliminary Injunction for the reasons that follow.

The Debtor's motion attempts to obtain in a specific TRO the same protections which are afforded all Debtors under 11 U.S.C. § 362. The Debtor's reason for desiring this specific order was outlined at the hearing. The Debtor is attempting to restrain the efforts of Prudential to foreclose on property of the Debtor. These actions are pending before the Bankruptcy Court, Northern District of Georgia, under a Chapter XII proceeding commenced in about 1975. This Court believes that a TRO or Preliminary Injunction Order would be redundant under these circumstances and that 11 U.S.C. § 362 is adequate to protect the Debtor's interests in property anywhere. 11 U.S.C. § 541

clearly creates an estate which includes all legal and equitable interests of the Debtor. The interest of the Debtor in the disputed real estate is such an interest.

The Debtor has filed a Motion for a Rule to Show Cause Why the Defendant Should Not Be Held in Contempt for Violation of the Automatic Stay. The Court has not responded. At the hearing, the parties presented the Court with a copy of Judge Robinson's Order dated March 26, 1984, dismissing a Colony Square case No. 82-254 filed on January 28, 1982. The 1982 case involved the same Debtor and substantially the same creditors. The dismissal is on appeal to the District Court for the Northern District of Georgia.

In the 1982 bankruptcy case No. 82-254, in an Opinion dated May 20, 1982 and in an Opinion at Adversary No. 82-914 dated September 15, 1983, this Court clearly expressed its views about this matter. The District Court for the Western District of Pennsylvania chose not to follow that Opinion and transferred the case to the Northern District of Georgia.

To complicate matters further, it has been brought to the Court's attention that on June 19, 1984, the District Court for the Western District of Pennsylvania denied the motion of Prudential to withdraw the reference and to transfer this case No. 84-0984 filed on May 3, 1984 to the Northern District of Georgia and suggested that Prudential seek a transfer of venue in this Bankruptcy Court first.

This case consists largely of a dispute between the Debtor and Prudential and represents only one substantial issue of law and fact. May Colony Square, using the 1978 Bankruptcy Code, file a case under Chapter 11 and reorganize its debts, when its largest debt is the subject of a previous Chapter XII Confirmed Plan, and when that Plan or Order attempted to retain jurisdiction in the Northern district of Georgia? Over six years later, may Prudential,

the largest creditor who is also secured, enforce the Chapter XII Plan in the Northern District of Georgia and prevent the Debtor from modifying Prudential with a new Chapter 11 Plan by dismissal rather than relief from stay or rejection of Plan, etc?

Both the District Court in the Western District of Pennsylvania and the Bankruptcy Court in the Northern District of Georgia rely upon *Freshman v. Atkins,* 269 U.S. 121, 46 S.Ct, 41, 70 L.Ed. 193 (1925), as authority for not maintaining the new bankruptcy action. This Court in Opinions already issued disagreed. *Freshman v. Atkins* dealt with nondischargeability of an individual's debt. Reliance upon *Freshman v. Atkins* is completely misplaced. Colony Square's debt to Prudential does not concern a nondischargeable debt. The previous Bankruptcy Acts as amended have held that once a debt is determined to be nondischargeable, it should not be relitigated. *Freshman v. Atkins* concerns a debt in which the debtor committed a wrongful or impremissible act and was determined to be nondischargeable. Under the present Code, that would be an action under § 523 or § 727 labeled objection to discharge. A debt to be restructured under a Plan is quite different.

The legal and factual question which will arise is whether the Chapter 11 Plan to be proposed by the Debtor can adequately protect the secured position of Prudential. This Court believes the 1978 Code entitled the debtor to have an opportunity to present such a Chapter 11 Plan and have it considered, etc. The Bankruptcy Court for the Northern District of Georgia views this problem in another light and reverses our action.

Additionally, our District Court determined in 1983 that venue was more properly in the Northern District of Georgia. We have no authority to disobey the mandates of our District Court. Although we hold a different view than

the Bankruptcy Court in Georgia, a sense of comity requires us not to conduct an unseemly dispute with a sister court in Georgia in the 84-984 case.

Finally, this dismissal is on appeal before the District Court of Georgia and the question of law which we thought viable can be resolved in that forum. For all these reasons, this court declines to act.

Dated this 27 day of June, 1984
at Pittsburgh, Pennsylvania

/s/ JOSEPH L. COSETTI
JOSEPH L. COSETTI
BANKRUPTCY JUDGE

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

COLONY SQUARE COMPANY
Debtor

Bankruptcy No. 82-254
Chapter 11

ORDER AMENDING OPINION

The Memorandum Opinion of May 10, 1982 in the above matter is hereby amended to read as follows:

Page 4—The second sentence should read:

> The six years is measured from October 16, 1975 and not from March 30, 1977.

Dated this 20 day of May, 1982
at Pittsburgh, Pennsylvania

/s/ JOSEPH L. COSETTI
JOSEPH L. COSETTI
BANKRUPTCY JUDGE

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Peter J. Kalis, Esq.
Michael J. Yurcheshen, Esq.
Jared I. Roberts, Esq.
F. M. Bird, Jr., Esq.
William Rodgers, Jr., Esq.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:
COLONY SQUARE COMPANY, Debtor

Bankruptcy No. 82-254
Chapter 11

MEMORANDUM OPINION

This matter comes before the Court on a Motion to Dismiss or For a Change in Venue or For Abstention. The Motion to Dismiss the Debtor's Chapter 11 Petition is filed by the Prudential Insurance Company of America ("Prudential"). Prudential asserts the following grounds for its Motion to Dismiss: lack of jurisdiction, want of good faith, violation of the doctrine of laches, and abstention. The Debtor, Colony Square Company ("CSC") answered the Motion to Dismiss. The parties have agreed to the facts and submit this issue to the Court on Briefs.

FINDINGS OF FACT

Colony filed a Petition for Relief under Chapter XII of the former Bankruptcy Act on October 16, 1975. This petition was filed in the United States Bankruptcy Court for the Northern District of Georgia. A Consolidated Plan of Arrangement ("Plan") was confirmed in that case by an Order signed by Judge Robinson on March 30, 1977. The Plan was proposed by Prudential, the largest secured creditor of Colony.

Paragraph (f) of the Confirmation Order reads, in pertinent part, as follows:

> This Court shall retain jurisdiction to enforce this Order and the Plan .... This Court shall, as provided in the Plan, retain exclusive jurisdiction of

> the debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto.

The Plan provided, *inter alia*, with respect to Prudential that:

> When the Plan was confirmed on March 30, 1977 by the Atlanta Court, CSC's and Prudential's relationship of borrower and lender were reaffirmed, and Prudential went into possession of the collateral under a five-year lease subject to two one-year renewals. Prudential could not foreclose or exercise other remedies as a lender during the initial term if CSC did not default on its sole obligation, which was to make annual contributions to offset certain operating costs. Beginning in 1978, CSC could regain possession by paying Prudential off or by bringing Prudential current, and making certain other payments, during the last 90 days (excepting New Year's Eve) of each year, including 1981. Prudential's Memorandum in Support at page 2.

CSC failed to make payments to Prudential by year end 1981, either to pay off the indebtedness or bring Prudential current. Neither had CSC in 1981 made the annual contribution to operating costs. Paragraph 111(B)(4) of the plan provides:

> CSC shall have the right to bring its indebtedness to Prudential current or pay the same in full as set forth therein, failing which CSC shall comply with its obligations to convey to Prudential all of its right, title and interest in and to the remaining property in return for the cancellation of CSC's indebtedness to Prudential.

The amount owing to Prudential at the end of 1981 was approximately 90 million dollars.

On January 26, 1982 CSC filed its Petition for Relief under Chapter 11 of the Bankruptcy Code in the Western District of Pennsylvania. This filing action automatically caused a stay of any attempt by Prudential to enforce its rights without permission of the Court. The Motion to Dismiss questions CSC's right to file a Chapter 11 Petition in this Court or elsewhere.

DISCUSSION

Prudential raises several arguments in support of its Motion to Dismiss and these will be discussed seriatim.

1. Lack of Jurisdiction

a) *Whether under the Bankruptcy Act and the Bankruptcy Code CSC's Chapter 11 Petition should be dismissed for lack of jurisdiction.*

Prudential argues that the Atlanta Court where a Bankruptcy case was commenced under the Act in 1975 retained exclusive jurisdiction over the property of the Debtor. The question now raised by this Motion to Dismiss is when does the exclusive jurisdiction of the Atlanta Court terminate.

Section 14(c)(5) of the Bankruptcy Act states:

> (c) The court shall grant the discharge unless satisfied that the bankrupt has . . .
>
> > (5) in a proceeding under this Act commenced *within six years prior* to the date of filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act.

The critical date is the date of the commencement of the case and not the date of confirmation of the Plan. The six years is measured from October 15, 1976 and not from March 22, 1977.

Under the scheme of the Act, a discharge of debts was granted, if among other things a debtor had not filed a petition for relief within the preceding six years. The Debtor here argues because six years have passed, it has the right to file a new petition. We have been unable to find language in the Bankruptcy Act that would forbid such a refiling.

Prudential argues that the new Code at 28 U.S.C. § 403(a) forbids a new filing in this instance. This section is a part of the transitional legislation which passed along with the new Bankruptcy Code and states:

> A case commenced under the Bankruptcy Act, and all other matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [the Bankruptcy Reform Act] had not been enacted, and the substantive rights of the parties connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter or proceeding as if the Act had not been enacted.

This Court agrees with the Debtor that on these facts this section is not applicable here. The section is applicable to a situation where a case was filed prior to the passage of the Bankruptcy Reform Act and the Debtor seeks to convert his case from one under the Act to one under the Code. See *Central Trust Co. v. Official Creditors Comm. of Geiger Enterprises, Inc.*, U.S. , 102 S.Ct. 695 (1982). In *Geiger* the six years had not passed. CSC argues that it could have filed a new case under the Bankruptcy Act and

that it is not prohibited by the Code from doing so. The Geiger rationale is not applicable.

This Court has been unable to find any case law on point. Our review of the statutes leads us to the conclusion that CSC is not forbidden by case law or statute from filing a Chapter 11 Petition in this Court after six years have passed.

b) *Does the Confirmation Order of the Atlanta Court forbid such a filing and mandate a dismissal of this Chapter 11 case?*

Section 476 of the Bankruptcy Act, which is applicable to a Chapter XII proceeding, states:

> The confirmation of an arrangement shall discharge a debtor from his debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, excluding such debts as are not dischargeable under Section 17 of this Act.

The Atlanta Court retained jurisdiction in its Confirmation Order to "enforce" the Plan. Prior to the filing here, CSC could not question the right of the Atlanta Court to enforce the Plan if a request was made upon it to do so. However, in this case, what is at issue now is not enforcement of the Plan but the fact of a new filing.

In this regard several additional factors are persuasive. First, the retention of jurisdiction is bound in the Confirmation Order and not in the Plan itself. The parties did not vote for a provision providing for the Atlanta Court's jurisdiction. This raises the question of how long should "wet nursing" be permitted.

Secondly, there are two other places in the Court's Order which seem to permit the Debtor to manage its own affairs without further supervision of the Atlanta Court.

The first of these is found at paragraph (3) of the Plan. This section reads in pertinent part as follows:

> Except as provided in this Order and Decree, all creditors and other parties to these proceedings whose claims are discharged or—to be discharged hereby and all other parties having a claim against the Debtor's property on the date hereof, . . . are hereby permanently enjoined from bringing any or maintaining any suit or action against the Debtor . . . provided, however, that this injunction shall not prevent any creditor or other party from seeking to enforce the provisions of the Plan or this order in this Court at any time when this Court has jurisdiction thereof, or if not within this Court's jurisdiction, or with this Court's leave, in any other forum; . . . .

This paragraph in the next to last phrase does not say "*and* with this Court's leave;" it says, "*or* with this Court's leave." We conclude that the Atlanta Court contemplated a time when it would not have jurisdiction of the Debtor or its property. Unfortunately, we are not told when that could be. The Debtor urges the interpretation that the Atlanta Court lost exclusive jurisdiction when six years have passed.

Similarly paragraph (k) of the Atlanta Court's Order states:

> Within ninety (90) days following the date on which the provisions of the Plan have been fully implemented, the Debtor shall file with the Court as its final report, a schedule of payments of creditors under the Plan based on information provided by LTIC and Prudential, and is hereby relieved of the necessity of filing any further operating statements. Upon the filing of such final

> report, Colony Square Company shall be discharged as a Debtor in Possession in these proceedings.

The paragraph refers to implementation of the Plan, not completion. This paragraph implements Section 476 of the Bankruptcy Act. There is no language in that section or in this paragraph giving the Court general power to retain jurisdiction. Since the Debtor is discharged any retention of jurisdiction can only be for the purpose of enforcing the Plan, if the Atlanta Court is requested to enforce the Plan. In other words, the Atlanta Court can enforce the Plan, but after the six years it cannot be the exclusive forum for seeking enforcement of the Plan. This is the only sensible interpretation if paragraphs (e), (f) and (k) of the Order are read together.

This Court is of the opinion that a reorganization case under the Bankruptcy Act or a Chapter 11 case under the Bankruptcy Code cannot be under the filing Court's protection indefinitely. The Second Circuit of Appeals stated in 1943:

> Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . have power to remain a wet nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction. *In re Flatbush Ave.-Nevins St. Corporation*, 133 F2d 760, 762 (1943).

In that case the Court was being asked to construe the terms of a voting trust that had been established as part of the plan of reorganization. The plan was approved on April 16, 1937 and the shares of stock deposited under the voting trust on July 30, 1937. A state statute provided that a voting trust like the one involved would automatically expire in five years unless 51% of the stock was voted for a continuance of the trust. The Trustees solicited nearly 50%

of the stock for a continuance and declared the trust to be continued prior to the expiration date. The District Court had reserved in the plan:

> Full right and jurisdiction to make from time to time such other and further orders in the proceedings as it may deem proper. Quoted in *Ibid.* at page 761.

Relying on this grant of power, the District Court construed the voting trust agreement and found, *inter alia*, that the voting trust had not been legally extended but had expired by its own terms on July 30, 1942. The Second Circuit upheld the finding enunciated by the lower court, but said:

> The court below had no jurisdiction to enter its extensive order which declared and settled all the rights and obligations of the parties.... Here respondent originally challenged the jurisdiction but ultimately acquiesced in it and now joins with the trustees to urge us to act in the premises. Even though our action must be as restricted as it was in the London Terrace case, we think that similar action here, indicating how the plan as to the voting trust is to be finally effectuated, is possible. We have neither the plan nor the court's full order before us, but it seems reasonable to conclude that the voting trust was an important feature of the plan, which necessarily suggests that the means of finally renewing or getting rid of that voting trust is also important. Accordingly, we feel justified in saying here that we do not believe a fair meaning of the plan, read in the light of the state statute, permitted the trustees to take the votes, insuring their own continuance in office, at any time they chose and then to close the books

> before the original period of the trust had terminated; we believe that the voting remained open until July 30, 1942, at which time the votes were not in favor of the continuance of the trust. Beyond this we cannot go.
>
> The order below will be modified to provide for the statement we have just made, and that either party may bring further proceedings in a court of proper jurisdiction. *Ibid.* at 762-62.

The order gives effect to the trust terms because of the consents to jurisdiction but at the same time allows either party to pursue further remedies in non-bankruptcy courts.

Prudential cites the Court to four subsequent cases, three in the Second Circuit and one in the Third Circuit, where the Court said it was appropriate for the reorganization Court to retain some jurisdiction in particular circumstances. The Second Circuit cases are *In re Dilbert's Quality Supermarket, Inc.*, 368 F2d 922 (2nd Cir. 1966); *North American Car Corporation vs. Peerless Weighing and Vending Machine Corporation*, 143 F2d 938 (2nd Cir. 1948); *Brooklyn Trust Co. v. Kelby*, 134 F2d 105 (2nd Cir. 1944) *cert. den.*, 319 U.S. 767 (1943). The Third Circuit case is *In re Pittsburgh Terminal Coal Corp.*, 183 F2d 520 (3rd Cir. 1950), *cert. den.*, 340 U.S. 904 (1950). The *Brooklyn Trust* case involved the turnover of assets by a Trustee to a new successor corporation. The Court found that the reorganization Court could appropriately retain jurisdiction to hear complaints regarding an accounting for the turnover. The *North American Car* case involved an application to exchange the stock in the debtor's successor corporation, after the time period set forth in the plan for the exchange had expired. The Circuit said that the reorganization Court did not have jurisdiction to involve itself in this controversy. In *Pittsburgh Terminal Coal* the Circuit recognized that it was appropriate for the reorganization

Court to retain jurisdiction over allegations of malfeasance by the officers of a successor corporation organized to liquidate the assets of the debtor. The facts of these cases are not close to this situation. Where the Courts did properly retain jurisdiction, there were questions of impropriety in the administration of the case. Most importantly, none of these cases involved the six year issue and a new filing.

The *Dilbert's Supermarket* case may be the most instructive for our purposes. In that case a plan had been confirmed on July 6 1964 and on March 29, 1965 a mortgagee moved in State Court to evict the Debtor from its premises. The mortgagee who had recently been assigned the mortgage apparently was unaware of the bankruptcy and after its initial action had been answered it moved for leave to continue its action in the Bankruptcy Court. The lease had been specifically affirmed on July 26, 1964 and the Debtor was current in its payments since that time. The reorganization Court enjoined the foreclosure action and the mortgagee appealed saying, *Inter alia,* that the reorganization Court lacked jurisdiction. The Circuit Court stated:

> Under the circumstances of this case we hold that the court did not pass on the validity of the lease and the mortgage claim. When reorganization has been completed and the new corporation is fully functioning as an economic unit, a court should not keep it indefinitely under the judicial wing. (Citations omitted.) Here, however, the claimed default was on July 14, 1964 two weeks prior to affirmation of the lease. Jurisdiction was properly retained by the court to protect its decree, to prevent interference with the execution of the plan and to aid otherwise in its operation. Much remained to be done before final decree could be entered—determination of inter-company claims, participation of classes of creditors, confirmation

> of other leases. The lease in question was essential to the functioning of the corporation in reorganization. Serious claims were made of irregularities in the purported creation and transfer of mortgage liens, foreclosure of which might operate to frustrate a substantial portion of the plan of reorganization. *In re Dilbert's Quality Supermarket, Inc.*, 368 F2d 922, 924 (1966).

Colony Square Company fits the description of the new corporation which is fully functioning as an economic unit. None of the policy considerations or time considerations which concerned the *Dilbert's* Court are present in this case. And once again, importantly, the Second Circuit was not faced with a six year passage of time and a new filing.

In conclusion, we find based on a review of the Atlanta Court's Order, the statute, rules, and case law that this Court does have jurisdiction to hear this case.

2. Whether CSC's Chapter 11 Petition should be dismissed for lack of good faith.

This Court is not persuaded that the Debtor filed this petition in bad faith. Prudential has not met its burden in this regard.

3. Whether CSC's Petition should be dismissed pursuant to the Doctrine of Laches.

This Court is not convinced on the basis of any of the authorities presented by Prudential that the doctrine of laches is applicable to the case at hand. The facts in *In re Eagson*, 1 B.R. 777 (E.D. Pa. 1980) do not apply in this case. In fact, the Eagson Court stated that "there is no mandate that a petition under Chapter 11 be filed within a certain time." *Id.* at 779. Without such a showing the doctrine of laches cannot be applied.

4. Whether this Court should abstain from entertaining these proceedings pursuant to the provisions of § 305(a)(1) of the Bankruptcy Code.

This Court finds Section 305(a)(1) not applicable to the case at hand. A Court under Section 305(a)(1) may dismiss or suspend a case if:

> (i) the interests of creditors and the debtor would be better served by such dismissal or suspension.

This Court believes that the record in this case does not support a finding that interests of the Debtor and the creditor would be better served by such suspension or dismissal. The legislative history suggests when such a dismissal may be appropriate.

> The court may dismiss or suspend under the first paragraph, for example, if an arrangement is being worked out by the creditors and the debtor out of court, there is no prejudice to the creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment. The less expensive out-of-court workout may better serve the interests in the case. House Report No. 95-595, 95th Cong., 1st Sess. (1977) 325; Senate Report No. 95-989, 95th Cong., 2nd Sess. (1978) 35.

No like interest of the creditors and CSC are involved here.

5. Whether for purposes of CSC's Chapter 11 Petition Venue is improper in this Court.

Prudential relies in this argument on Bankruptcy Rule 11-7. However, that rule applies to Chapter XI cases, and therefore it is inapplicable here. In fact, Prudential does

not dispute that pursuant to 28 U.S.C. § 1472(1), venue for this case is proper in this Court.

6. Whether this Court should abstain from hearing this case pursuant to 28 U.S.C. § 1471(d).

Prudential's reliance on 28 U.S.C. § 1471(d) is misplaced. This section refers to abstaining from hearing a proceeding not a case. "Case" refers to the bankruptcy itself while a "proceeding" is a matter ancillary to the case. See this Court's decision in *In re Johanna A. Stamm, et al. vs. Rapco Foam, Inc., et al.*, Adversary No. 81-1531, February 26, 1982, pages 8-9; Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue and Procedure*, 11 St. Mary's L.J. 265, (1979); House Report No. 95-595, 95th Cong., 1st Sess. (1977) 445; Senate Report No. 95-989, 95th Cong., 2nd Sess. (1978) 153-4. Prudential's request for abstention in this instance will not be granted.

In conclusion, for the reasons stated above, Prudential's Motion to Dismiss, or for Abstention or for Change of Venue is Denied.

An appropriate Order will issue.

The Court notes that this case was filed on January 28, 1982, and that CSC has the exclusive right until May 28, 1982 in which to file a Plan and that CSC must provide adequate protection. The secured position of Prudential cannot be modified without providing the indubitable equivalent to Prudential.

Dated this 10th day of May, 1982
at Pittsburgh, Pennsylvania

/s/ JOSEPH L. COSETTI
JOSEPH L. COSETTI
BANKRUPTCY JUDGE

cc: George M. Cheever, Esq.
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2900 Grant Building
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IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

COLONY SQUARE COMPANY
Debtor

Bankruptcy No. 82-254
Chapter 11

ORDER OF COURT

AND NOW, this 10th day of May, 1982, upon the basis of the Memorandum Opinion of even date herewith, IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss or for a Change of Venue or for Abstention filed by the Prudential Insurance Company of America is DENIED.

At Pittsburgh, Pennsylvania.

/s/ JOSEPH L. COSETTI
JOSEPH L. COSETTI
BANKRUPTCY JUDGE

cc: George M. Cheever, Esq.
Peter J. Kalis, Esq.
Michael J. Yurcheshen, Esq.
Jared I. Roberts, Esq.
F. M. Bird, Jr., Esq.
William Rodgers, Jr., Esq.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE:

COLONY SQUARE COMPANY, A Georgia Limited Partnership, Debtor,

COLONY SQUARE COMPANY,
Plaintiff-Appellant,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al.,
Defendants-Appellees.

No. 85-8568 & 85-8569
D.C. Docket Nos. 84-1109 & 84-1621

Appeal from the United States District Court for the Northern District of Georgia

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Before KRAVITCH and HATCHETT, Circuit Judges, and DUMBAULD*, Senior District Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Entered: May 6, 1986
For the Court: Spencer D. Mercer, Clerk

By: ..... /s/ .....
Deputy Clerk

ISSUED AS MANDATE: MAY 28, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE:

COLONY SQUARE COMPANY, Debtor,

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Plaintiff-Appellant,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Defendant-Appellee.

No. 85-8216

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

MAR 14 1986

SPENCER D. MERCER, Clerk

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 10, 11 Cir., 1986, F.2d).
(March 14, 1986)

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Circuit Judge.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active

*Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE:

COLONY SQUARE COMPANY, Debtor,

COLONY SQUARE COMPANY,
A Georgia Limited Partnership, Plaintiff-Appellant,

versus

PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Defendant-Appellee.

No. 85-8216
D.C. Docket No. 84-1793

FILED IN CLERK'S OFFICE
U.S.D.C.—Atlanta

MAR 28 1986

LUTHER D. THOMAS, Clerk

Appeal from the United States District Court for the Northern District of Georgia

---

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of

---

*Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 10, 1986
For the Court: Spencer D. Mercer, Clerk

By: ...../s/.....
Deputy Clerk

ISSUED AS MANDATE: MARCH 26, 1986

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

IN RE:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

C84-1109A

FILED IN CLERK'S OFFICE
U.S.D.C.—Atlanta

MAY 9 1986

LUTHER D. THOMAS, Clerk

ORDER

This case is before the court on Colony Square Company's ("CSC") amended motion for disqualification and other relief. An evidentiary hearing was conducted by the court with respect to this motion on October 15-19, 1985. The court directed the parties to file post-hearing briefs and took the matter under advisement.[1]

CSC's motion is predicated on the claim that attorneys from Alston & Bird, counsel for Prudential Insurance Company, wrote certain orders which were signed and issued by Bankruptcy Judge Hugh Robinson without the prior knowledge of counsel for CSC. CSC specifically requests that the court grant the following relief:

> (1) Vacate and expunge the June 25, 1984 judgment and order of Judge Robinson, granting title to the Colony Square complex to Prudential ("the title order");

[1]CSC was also filed a motion to admit as evidence certain notes taken by Francis M. Bird, Jr., during a phone conversation with Judge Robinson. The notes were located only after the October hearing. CSC's motion to supplement the record is granted.

(2) Vacate and expunge the April 2, 1985 order and May 7, 1985 judgment of the United States District Court for the Northern District of Georgia, affirming the June 25, 1984 judgment and order of the Bankruptcy Court;

(3) Vacate and expunge the following orders of the Bankruptcy Court:

(i) the September 7, 1984 order denying CSC's motion for order setting briefing schedule, evidentiary hearing, and oral argument;

(ii) the September 7, 1984 order denying CSC's motion for order setting briefing schedule and oral argument;

(iii) the October 29, 1984 order denying CSC's motion for disqualification of Judge Robinson;

(iv) the November 26, 1984 order denying CSC's motion for reconsideration of an October 30, 1984 order, motion to strike affidavit of Grant T. Stein, and request for expedited hearing;

(4) Disqualify Judge Robinson from further participation in any proceedings involving CSC;

(5) Disqualify Alston & Bird from further participation in any proceedings involving CSC;

(6) Instruct the Bankruptcy Court to reconsider *de novo* all the matters giving rise to an order vacated and expunged by this court;

(7) Award CSC and its counsel their attorney's fees and expenses incurred in connection with each of the motions giving rise to an order authored by Alston & Bird, appeals therefrom, and this motion for disqualification and other relief.

Prudential requests that the court deny the relief sought by CSC and instead award Prudential its expenses and fees incurred in defending this motion.

I. PROCEDURAL BACKGROUND

The procedural background leading up to the actions which gave rise to this motion are summarized in this court's order of April 2, 1985, and in the January 10, 1986 opinion of the Eleventh Circuit. *See In re Colony Square Company,* 779 F.2d 653 (11th Cir. 1986); *In re Colony Square Company,* Civil Action No. 84-1793A (N.D. Ga. April 2, 1985) (Freeman, J.). On October 16, 1975, CSC filed a voluntary petition under Chapter XII of the Bankruptcy Act of 1898 (formerly 11 U.S.C. § 701 *et seq.*). In an order dated March 30, 1977, Judge Robinson of the United States Bankruptcy Court for the Northern District of Georgia confirmed the Chapter XII Plan for CSC which had been proposed by Prudential, the principal secured creditor of CSC, and consented to by CSC. The Plan provided that CSC would maintain ownership of the Colony Square Complex and that Prudential would lease and manage this property. The Plan also indicated that the Bankruptcy Court for the Northern District of Georgia retained jurisdiction over the property.

CSC subsequently failed to make cash contributions or bring its debt to Prudential current, as required by a Moratorium Agreement entered into concurrently with the lease. Prudential therefore gave CSC notice that it intended to exercise its option under the Agreement to acquire title to the property. January 29, 1982 was set as the date for tender of the debt-cancellation documents.

On January 28, 1982, CSC filed a Chapter 11 case under Title 11, United States Code, as amended by the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.* The Chapter 11 case was filed in the Bankruptcy Court for

the Western District of Pennsylvania (the "Pittsburgh bankruptcy court"). The transfer of title to the property from CSC to Prudential did not take place as scheduled.

Prudential moved to dismiss the Chapter 11 case in Pittsburgh. The motion to dismiss was initially denied by the Pittsburgh bankruptcy court. *See In re Colony Square Co.,* 22 B.R. 92 (Bankr. W.D. Pa. 1982). This decision was reversed by the United States District Court for the Western District of Pennsylvania which, in November 1983, transferred the Chapter 11 case to this court. *Prudential Ins. Co. of America v. Colony Square Co.,* 29 B.R. 424 (W.D. Pa. 1983). By order entered February 2, 1984, this court referred the Chapter 11 case to the Bankruptcy Court for the Northern District of Georgia. On March 26, 1984, the bankruptcy court, per Judge Robinson, dismissed the Chapter 11 case. This order, which is not challenged in the instant motion, was affirmed by this court in an order dated June 28, 1985. *In re Colony Square Company,* Civil Action No. 84-1109A (N.D. Ga. June 28, 1985) (Freeman, J.). In an opinion dated May 6, 1986, the Eleventh Circuit affirmed the order of this court. *In re Colony Square Company,* No. 85-8568, slip op. (11th Cir. May 6, 1986).

On April 30, 1984, an involuntary Chapter 7 petition was filed against CSC in the Western District of Pennsylvania. CSC converted this action to a Chapter 11 proceeding on June 20, 1984. This matter apparently remains pending in the Pittsburgh court.

On February 9, 1984, Prudential filed a motion in the Atlanta bankruptcy court seeking to compel CSC's compliance with the Chapter XII Plan of reorganization. CSC's response was twofold, asserting first that Prudential had mismanaged the property, and second, that the automatic stay provision of section 362 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 362, prevented the Atlanta bankruptcy court from proceeding with the Chapter XII case

while the second Chapter 11 action was pending in the Pittsburgh bankruptcy court. On May 14, 1984, the Atlanta bankruptcy court issued an order denying CSC's attempt to assert mismanagement and bad faith defenses in connection with Prudential's motion to enforce the plan. This order, which also is not challenged in the instant motion, was appealed to this court. By order dated April 2, 1985, this court affirmed the Bankruptcy Court. The Eleventh Circuit has affirmed the April 2 order of this court. *In re Colony Square Co.*, 779 F.2d at 655.

On June 22, 1984, a final hearing was held by Judge Robinson on Prudential's motion to compel enforcement of the Chapter XII Plan. CSC argued at the hearing that the bankruptcy court and Prudential were enjoined from proceeding with the hearing by virtue of the automatic stay provision of Chapter 11. Judge Robinson indicated that in his opinion, the Atlanta bankruptcy court retained exclusive jurisdiction over the debt involved in the Chapter XII proceeding and that the section 362 stay was therefore inapplicable. *See* Defendant's Exhibit 130 at 40-41.[2]

On June 25, 1984, Judge Robinson entered an order enforcing the Chapter XII Plan. This order, which CSC seeks to vacate and expunge in this motion, was appealed to this court. In the April 2, 1985 order of this court, the court affirmed the June 25, 1984 order of the bankruptcy court. The ruling was appealed to the Eleventh Circuit, which denied CSC's request to stay its decision pending this court's ruling on the instant motion. Instead, the Eleventh Circuit affirmed that April 2, 1985 order of this court, holding that "the stay provision [of section 362] had no effect on Prudential's action to enforce the March 30, 1977

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[2]After Judge Robinson indicated that he would proceed with the hearing despite the pending Chapter 11 case in Pittsburgh, CSC orally moved for Judge Robinson to recuse himself. Judge Robinson denied this motion from the bench, although he later withdrew this ruling and invited a written motion and briefs.

plan, which was commenced under the former Bankruptcy Act of 1898." 779 F.2d at 655. The Eleventh Circuit premised its ruling on the Supreme Court opinion in *Central Trust Co. v. Official Creditors' Committee.* 454 U.S. 354, 102 S.Ct. 695 (1982), and on the Atlanta bankruptcy court's express retention of exclusive jurisdiction over the Chapter XII plan, the property, and the parties. The Court of Appeals pointed out that "[t]he affirmance is based on the appropriate reasoning of both the bankruptcy court and the district court." 779 F.2d at 655.

II. FACTUAL BACKGROUND TO THIS MOTION

A. The Title Order

As noted above, Judge Robinson held a final hearing on Prudential's motion to compel compliance with the Chapter XII Plan on Friday morning, June 22, 1984. At approximately 2:00-2:30 that afternoon, Judge Robinson telephoned Francis M. Bird, Jr., lead counsel for Alston & Bird in this litigation. At the time, Bird was in a conference with other Alston & Bird attorneys and Prudential in-house counsel. According to Bird, Judge Robinson indicated that he had decided to rule in Prudential's favor and that, due to the fact that the bankruptcy courts were about to "sunset" or "go out of existence," if Prudential wanted a written order, it would have to prepare and submit one. Bird stated that he was told by Judge Robinson that Judge Robinson had read the brief which CSC filed during the June 22 hearing and that certain points should be covered in the order. No mention was made by either Judge Robinson or Bird regarding notification to CSC.

Bird's recollection of the June 22 conversation with Judge Robinson is consistent with Judge Robinson's interrogatory response regarding this conversation. Judge Robinson stated as follows:

> When I spoke with Frank Bird prior to the entry of the June 25, 1984 order, I told him that Prudential was the prevailing party on its Motion to Enforce Court Order and to Compel Debtor to Carry Out Arrangement. I informed Frank Bird of the factual and legal basis for my decision. In the interest of time, I asked Frank Bird to be a scrivener and to prepare proposed findings of fact and conclusions of law for the court's review. He agreed to my request.

See Judge Robinson's Answer to Interrogatory No. 2.[3] According to Judge Robinson, after receiving the proposed order, "[t]he court reviewed the draft, made whatever editorial, factual or legal changes it deemed appropriate and then the court entered the final order as correctly setting forth its findings and conclusions in the matter. The final version was the court's version." *Id.* at No. 3c.

After concluding the discussion with Judge Robinson, Bird excused himself from the conference and prepared an order to be submitted to the judge. The order was delivered to Judge Robinson about 6:00 that afternoon by Grant Stein, an associate with Alston & Bird. At the time that he delivered the order, Stein arranged a hearing with Judge Robinson for 9:30 a.m., Monday, June 25, 1984, for the presentation of an emergency motion.

On June 25, 1984, two hearings were held in different bankruptcy courts. In the Atlanta bankruptcy court, Judge Robinson held a hearing on Prudential's Motion For Issuance of Order in Aid of Jurisdiction. Prudential was represented at this hearing by R. Neal Batson, an Alston & Bird partner. CSC was represented by Jerry Blackstock and Kenneth Shapiro of Powell, Goldstein, Frazer & Murphy. Prior to the hearing, Batson delivered to Judge Robinson a

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[3]By orders dated September 9 and September 17, 1985, this court allowed CSC to undertake limited discovery from Judge Robinson by use of written interrogatories.

corrected copy of the order which had been submitted to Judge Robinson on June 22, which contained some typographical errors. No mention was made of this order to counsel for CSC during the hearing, either by Judge Robinson or Mr. Batson. Later that afternoon, Judge Robinson called Alston & Bird to have an additional typographical error corrected. A corrected version was delivered to Judge Robinson that afternoon and signed by the judge.

At 8:00 a.m. on June 25, 1984, Judge Cosetti of the Pittsburgh bankruptcy court held a hearing on CSC's Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. CSC was seeking to enjoin Prudential from taking any action against the Colony Square property. CSC was represented by Thomas Johnson of Kirkpatrick & Lockhart; Prudential was represented by Frank Bird. During the course of the arguments made to Judge Cosetti, Mr. Bird stated as follows:

> Colony is attempting to use this Court to avoid the obligations, to face the Atlanta court. We don't know how Judge Robinson is going to rule. We think we have a good case for getting Prudential's deed. But that's in the breast of that court. But they just don't want to face Judge Robinson.

Plaintiff's Exhibit 3 at 36. Mr. Bird did not reveal his discussion with Judge Robinson to Judge Cosetti or counsel for CSC. In an order dated June 27, 1984, Judge Cosetti denied the motion for a temporary restraining order. In the order, Judge Cosetti expressed his belief that by virtue of the pending Chapter 11 case, section 362 protected CSC's interest in property anywhere. This view, of course, runs counter to the views expressed by the Western District of Pennsylvania, the Atlanta bankruptcy court, this court, and the Eleventh Circuit Court of Appeals. Judge Cosetti

also indicated that a sense of comity required that he not engage in a dispute with the Atlanta bankruptcy court.

B. The September Orders

On August 27 and 28, 1984, six motions were argued before Judge Robinson. On August 29, 1984, Judge Robinson again contacted Frank Bird. Judge Robinson advised Mr. Bird that he had decided to deny three motions filed by CSC and he asked Bird to prepare orders. These motions were CSC's Motion for Stay of the June 25, 1984 Judgment and Order; CSC's Motion for Order Setting Briefing Schedule, Evidentiary Hearing and Oral Argument; and CSC's Motion for Order Setting Briefing Schedule and Oral Argument. Judge Robinson also asked Bird to contact counsel for CSC to inform them of his decisions.

After speaking with Judge Robinson, Bird tried unsuccessfully to reach Jerry Blackstock of Powell, Goldstein. Later that day, however, Bird was able to contact Ken Shapiro, also of Powell, Goldstein. Bird informed Shapiro of the substance of the discussion with Judge Robinson. Shapiro, in turn, communicated this information to George Cheever of Kirkpatrick & Lockhart, who circulated a memorandum regarding this information to other attorneys at Kirkpatrick & Lockhart who were involved in this litigation. *See* Defendant's Exhibit 192. Bird prepared and submitted the three requested orders to Judge Robinson but did not serve copies of the orders on counsel for CSC. Judge Robinson signed the order denying the motion for a stay on September 4, 1984, and signed the two orders regarding briefing schedules on September 7, 1984. *See* CS-6, CS-7, CS-9.

C. The Disqualification Order

At the June 22, 1984 hearing in the Atlanta bankruptcy court, Judge Robinson orally denied CSC's motion for recusal. By letter dated June 25, 1984, Judge Robinson

withdrew his denial of the motion and invited a written motion. PR-27. On August 31, 1984, CSC filed, pursuant to 28 U.S.C. §§ 144 and 455, a written Motion for Disqualification and Affidavit. The motion was filed with both the Atlanta bankruptcy court and with this court. *See* Defendant's Exhibits 217-220.

Prudential filed a response to CSC's motion for disqualification in both the bankruptcy and district courts. Attached to Prudential's response was an affidavit executed by Frank Bird. Among other things, Bird stated as follows:

> To the extent the second sentence implies *ex parte* contact in reference to the case, affiant denies the same. To the extent the second sentence of paragraph 4b together with the un-numbered paragraph following said paragraph, suggests a relationship tending to create favoritism (in light of the argument at pp. 9-10 of the Brief), affiant denies any such relationship. Affiant's sole contacts with Judge Robinson have been through the judicial process and not social or personal on any occasion; except for the possibility of an occasional casual encounter in the courthouse, on the street, or at the Southeastern Bankruptcy Law Institute, affiant has had no *ex parte* contact with Judge Robinson, and affiant has sought to consciously avoid any improper contacts or the appearance thereof.

Plaintiff's Exhibit 4.

The motion for disqualification which was filed in the bankruptcy court was argued before Judge Robinson on September 17, 1984. *See* Defendant's Exhibit 147. On or about October 19, 1984, Judge Robinson called Frank Bird, indicated that he had decided to deny the motion for disqualification, and requested that Bird prepare an order. Mr. Bird took notes of the points which Judge Robinson indicated should be covered in the order. *See* Plaintiff's

Exhibit 39. Bird assigned the task of drafting the order to Mr. Stein. Stein prepared drafts of an order, using among other sources the notes taken by Bird. The order was submitted to Judge Robinson on or about October 25, 1984, without copies being served on counsel for CSC. Judge Robinson signed the order on October 29, 1984. CS-11. The order was appealed to this court which, by order dated March 12, 1985, affirmed the order of the bankruptcy court. *In Re Colony Square Company,* Civil Action No. 84-2491A (N.D. Ga. March 12, 1985) (Freeman, J.). This court had previously denied the motion for disqualification of Judge Robinson which had been filed in this court. *In Re Colony Square Company,* Civil Action No. 84-1245A (N.D. Ga. Dec. 21, 1984) (Freeman, J.); *In Re Colony Square Company,* Civil Action No. 84-1109A (N.D. Ga. Dec. 27, 1984) (Freeman, J.).

D. November 26, 1984 Order

By order entered October 30, 1984, the bankruptcy court awarded Prudential attorneys' fees as sanctions against CSC based on a discovery dispute. On November 5, 1984, CSC filed a Motion for Reconsideration of October 30, 1984 Order, Motion to Strike Affidavit of Grant T. Stein, and Request for Expedited Hearing. On or about November 15, 1984, Judge Robinson telephoned Mr. Stein and requested that he prepare and submit an order denying CSC's motion. Stein prepared the order, using his notes from the discussion with Judge Robinson, the pleadings which had been filed in the matter, and his own knowledge of the issues. Transcript, Vol. 2 at 223. The order was submitted to Judge Robinson without a copy being served on counsel for CSC. The order was signed by Judge Robinson on November 26, 1985.

E. Knowledge and Suspicions of Counsel for CSC

CSC has argued that it did not learn of the conduct which it now challenges until May 20, 1985, when Tom Johnson raised the issue in a telephone conversation with Frank Bird. Prudential contends that the evidence adduced demonstrates that CSC either knew or suspected that Alston & Bird had authored opinions for Judge Robinson long before May 20, 1985.

Prudential points out that in CSC's original motion for disqualification, CSC sought to expunge seven orders entered by Judge Robinson: the five orders challenged in this amended motion plus the September 4 order denying its motion for a stay and an October 30, 1984 order awarding attorney's fees to Prudential (the quantification order). CSC asserted in its original motion that its attorneys were not advised or aware of the *ex parte* communications leading to these orders or that Alston & Bird had authored them. Discovery undertaken to facilitate an informed ruling on this motion has since shown that CSC's original allegations were inaccurate. As discussed above, it is now clear that on August 29, 1984, Frank Bird informed Ken Shapiro of his August 29 conversation with Judge Robinson in which Judge Robinson indicated that he would rule in Prudential's favor on three motions and requested that Bird submit appropriate orders. Shapiro communicated this information to George Cheever who reported the information by memorandum to five other Kirkpatrick & Lockhart attorneys.

A careful review of the files of counsel for CSC also revealed that counsel had in fact received from Alston & Bird a copy of the proposed order which Judge Robinson entered on October 30, 1984, awarding sanctions to Prudential. *See* PR-28. Thus, of the seven orders challenged in the original June 6, 1985 motion, counsel for CSC received a copy of one of the orders from Alston & Bird and were

notified of Judge Robinson's decision and request that Alston & Bird submit orders with respect to three of the orders. With respect to the five orders which CSC now asks this court to vacate, the evidence demonstrates that with regard to two of these orders, CSC was informed that Judge Robinson had decided to rule in Prudential's favor and had requested the submission of orders from Alston & Bird.

The title order, which was signed by Judge Robinson on June 25, 1984, first became known to CSC counsel on June 26, 1984, when Larry Bogart, a partner at Powell, Goldstein, received the order in the mail. Mr. Bogart testified that he telephoned Tom Johnson in Pittsburgh to inform him of the order. As stated by Bogart, "I told [Johnson] we had received the order, it was bad news, and it was so bad it seemed to me it could have been written by Alston & Bird." Transcript, Volume 3 at 18. Mr. Bogart explained that he wanted to convey to Johnson as succintly as possible how "bad" the order was but that he did not suspect that the order was actually written by Alston & Bird.

Mr. Bogart subsequently contacted Frank Bird regarding the possibility of obtaining a stay of the June 25, 1984 judgment and order. Bogart contends that he congratulated Bird on the victory and then discussed whether Bird would consent to a stay of the judgment. Mr. Bird presented a very different version of the June 26, 1984 discussion. According to Bird, Bogart stated: "I like your handiwork or I like what you did, or words to that effect." Transcript, Volume 1 at 95. Bird purportedly responded, "Larry you know what the custom and practice has been over there ever since you and I started." *Id.* Bird later explained how he interpreted Bogart's remark:

> A. I think [Bogart] was making a statement, I think he was asking a question at the same time. His statement

was, I knew you drew this order but I want you to confirm it to me. That is the way I interpret it.

Q. You are not saying he said that, it was your interpretation?

A. Yes, that is what I heard him say.

Q. You didn't hear him say that, in your mind that is what you understood the meaning of what he said, is that correct?

A. That's correct.

Q. Now, why didn't you simply tell him that you had prepared the June 25, 1984 order and get rid of the subject, get it out in the open?

A. As far as I was concerned it was in the open.

Id. at 97-98.

Mr. Bogart testified that he could have used the words attributed to him by Bird. Bogart explained, however, that if he had used these words, they did not have the same meaning to him that they might have had to Bird. Bogart went on to suggest that the contrasting interpretations given the June 26 conversation could be based on the fact that Bird actually knew of the origin of the title order whereas Bogart did not possess this knowledge. Bogart denied having any suspicion at the time that Alston & Bird had drafted the title order.

Prudential points out that in terms of appearance, the orders prepared by Alston & Bird were noticeably different from orders prepared in Judge Robinson's chambers. Orders which were prepared in Judge Robinson's chambers and served on counsel for CSC were on lined paper and, on the bottom left corner, contain the designation "A-O 72-A, Rev. 8/82". In contrast, the orders prepared by Alston & Bird were served on unlined paper and did not

contain this designation. When CSC made an initial decision to pursue this matter, Ken Shapiro of Powell, Goldstein visually reviewed orders entered in this case. Shapiro compared the type face, the style of caption, the type of paper, and the writing style. As stated in a memorandum of Tom Johnson, "[Shapiro's] review thoroughly convinces him that Alston & Bird prepared the June 25, 1984 title transfer order." Defendant's Exhibit 207.

The submission of the title order to Judge Robinson without prior notice to opposing counsel was not the first instance in which this type of procedure has been used. Ken Shapiro admitted that approximately a year before the filing of the title order, Judge Robinson had telephoned him regarding a different adversarial proceeding and requested that he submit an order on his client's behalf. Shapiro prepared and submitted the order without providing notice to or serving a copy on his opposing counsel. Judge Robinson made a number of changes to the order and had it retyped before entering it. Shapiro testified that at the time he prepared this order, he did not consider whether his action was improper but that he now believes his conduct was in fact improper.

The testimony presented at the hearing also indicates that Mr. Bogart was not the only Powell, Goldstein attorney to describe Judge Robinson's orders as "so bad they could have been written by Alston & Bird." Ken Shapiro testified that during November or early December 1984, he had a conversation with Jerry Blackstock, the lead litigation partner from Powell, Goldstein during which Blackstock used this description. Shapiro described Blackstock's remark as an "offhand comment." Transcript, Volume 3 at 93. At his deposition, Shapiro was asked what he said, if anything, in reponse to the remark. At the time, Shapiro answered, "I think I may have said something like, 'maybe so' ". *Id.* at 95. During the hearing, however, Shapiro

asserted that his deposition testimony was mere speculation and that it did not occur to him until April 1985 that Alston & Bird might have prepared orders for Judge Robinson. Shapiro also claimed that at the time he had this conversation with Jerry Blackstock, he did not recall that he himself had previously prepared an order for Judge Robinson.

Jerry Blackstock again described Judge Robinson's orders as so bad they could have been prepared by Alston & Bird on December 5, 1984, in Pittsburgh. The statement was apparently made on an elevator in the presence of Shapiro, George Cheever, Tom Johnson, and possibly another CSC attorney. Cheever testified that he took the comment to mean that the preparation of orders by Alston & Bird "was a seriously entertained suspicion." Transcript, Volume 3 at 146.

According to Blackstock, Cheever responded to his comment by saying something like, "Well, you don't think they were, do you?" Blackstock's response to this query was that it was highly unlikely that Alston & Bird had prepared orders but that it would be very difficult to prove in any event. Transcript Vol. 3 at 214, 234-5. Blackstock admitted on cross-examination that his answer at least implied the possibility that Alston & Bird had in fact prepared orders. *Id.* at 236. Blackstock went on to explain, however, that he did not believe at the time that Alston & Bird had prepared orders for Judge Robinson without notifying counsel for CSC. *Id.* at 237.

Although Mr. Blackstock himself may not have believed in December 1984, that Alston & Bird had prepared opinions for Judge Robinson, George Cheever came away from this conversation with the distinct belief that Powell, Goldstein attorneys suspected Alston & Bird of preparing orders. *Id.* at 146. Cheever testified that he gave no further thought to this matter until he read an article in

the March 1985 issue of *American Lawyer* which discussed the decision in *In re Wisconsin Steel,* 48 B.R. 753 (N.D. Ill. 1985). On March 29, 1985, Cheever circulated a memorandum among the Kirkpatrick & Lockhart attorneys in which he states: "If my memory serves me well, it was the general sense among our co-counsel at the Powell, Goldstein firm that most if not all of Judge Robinson's opinions handed down in the Colony Square proceedings were in fact authored by lawyers at Alston & Bird." Defendant's Exhibit 203. Cheever reconfirmed during his testimony that he emerged from the conversation with Mr. Blackstock with the belief that it was the general sense among the Powell, Goldstein attorneys that most if not all of Judge Robinson's orders were authored by Alston & Bird. Transcript, Vol 3. at 171. Cheever nonetheless took no action to pursue the matter at that time, despite the fact that Colony Square's motion for the disqualification of Judge Robinson, which had been filed with this court on August 31, 1984, was still pending. Other Kirkpatrick & Lockhart attorneys testified that they were aware of suspicions that Alston & Bird had prepared orders for Judge Robinson prior to receiving a copy of Cheever's March 29, 1985 memorandum. *See* Finegold Deposition, Defendant's Exhibit 229 at 36; Gespass Deposition, Defendant's Exhibit 230 at 67-68.

F. Alleged *Ex Parte* Contacts by CSC Counsel in the Colony Square Proceedings.

Prudential contends that counsel for CSC has also engaged in *ex parte* communications with bankruptcy judges during the course of this litigation. Larry Bogart of Powell, Goldstein testified as follows regarding a meeting he had with Judge Robinson early on in the proceedings:

> I don't recall the year, but I do recall that there was a motion to appoint a receiver for Colony Square Company. I called Judge Robinson's office and asked if I

could have a meeting with him. Such a meeting was granted, I went to meet with Judge Robinson to inform him that I represented the non-Georgia limited partners and that if the motion to appoint a receiver were brought on for a hearing I would like to have the opportunity to be heard at that time.

Q. Was anyone else present when you met with Judge Robinson?

A. No, sir.

Q. Did anyone else have knowledge with respect to your meeting with Judge Robinson before it took place?

A. I don't think so.

Q. And the purpose of your going to see Judge Robinson was to request that if the court considered the motion for the appointment—was it a receiver or trustee?

A. It was the motion for the appointment of a receiver.

Q. And the purpose of your going to see Judge Robinson was to request him that in the event the court considered that matter to give you an opportunity to be heard?

A. That's correct.

Q. Why didn't you simply file a petition to intervene?

A. I had the feeling that it would be better if the limited partners were not officially parties to that bankruptcy matter.

Q. Well, why was that?

A. I just felt is was better to be as uninvolved with the bankruptcy matter as possible and to keep as low a profile for the limiteds as possible.

The Court: I don't understand. You wanted to keep a low profile, but at the same time you wanted an opportunity to be heard in their behalf?

The Witness: If the matter came on for a hearing, Your Honor, I did want to be heard.

The Court: So you were willing, then, not to be low profile?

The Witness: Yes, sir, if it became necessary at that time.

Transcript, Vol. 3 at 23-25. Significantly, Bogart's testimony indicates that he was merely requesting, albeit in a somewhat secretive manner, an opportunity to be heard rather than discussing the merits of the litigation.

Prudential also asserts that Kirkpatrick & Lockhart has "caused orders to be presented to the Bankruptcy Judge in Pittsburgh in matters opposed by Prudential without Prudential being given a copy of the orders at or prior to the time they were submitted to the Bankruptcy Court." Prudential's Post-hearing Brief at 43. The orders challenged by Prudential are three orders entered by Judge Cosetti which awarded interim compensation to attorneys for the debtor, including Powell, Goldstein, over the objection of Prudential. *See* Defendant's Exhibits 200, 201, 202. Defendant's Exhibit 200 has a copy of George Cheever's business card attached to it. Mr. Cheever testified that he prepared this order and sent them to the Colony Square attorney involved in the fee application. According to Cheever, his purpose was to prepare an order which could be presented at the fee hearing. Cheever testified that he "expected Mr. Turick to show them to counsel for Prudential. And as far as I know, that's exactly what he did."

Transcript, Vol. 3 at 188. Cheever could not actually say, however, whether Mr. Turick had shown these orders to Prudential counsel because he had not asked Mr. Turick, although the issue of preparation and service of these orders came up during Mr. Cheever's deposition. *See* Cheever Deposition at 118-131. Mr. Cheever testified that he also prepared the orders submitted as Defendant's Exhibits 201 and 202. Although Cheever could not say how the orders were submitted and whether they were served on counsel for Prudential he testified that a review of the docket and the orders themselves leads to the conclusion that the orders were filed in the clerk's office on December 5, 1984.

Prudential has submitted affidavits of George E. Pierce, Jr., and Michael J. Yurcheshen, co-counsel for Prudential in the bankruptcy proceeding in Pittsburgh. Pierce and Yurcheshen state that prior to the date of signature of the orders, they were not "served with draft copies . . . or otherwise notified of said proposed orders, or that the same had been filed with or in any manner offered to the court." Defendant's Exhibits 223 and 224. Yurcheshen further states that "Affiant has examined the originals of said orders in the court's file, and has ascertained from the stamps thereof that said orders were filed on December 5, 1984, bearing a stamp indicating that same was received in chambers of a bankruptcy judge rather than in the office of clerk of said court." Defendant's Exhibit 223 at ¶ 6. CSC responds that it was not required under Bankruptcy Rule 2002 to serve the fee application and that, in any event, it took the position at the hearing that Prudential was not listed as an unsecured creditor and therefore was not entitled to notice. CSC also points out that Prudential had actual knowledge of the fee hearing and was able to obtain a copy of the bankruptcy court docket, on which the fee applications are shown. *See* Transcript, Vol. IV at 21-31.

A review of the evidence and the testimony leads this court to conclude that Defendant's Exhibits 200-202 and the affidavits of Pierce and Yurcheshen add little of value to the issues presented. It is undisputed that Prudential was aware of and actively participated in the fee hearing before Judge Cosetti. Prudential also had access to the bankruptcy court docket. *See* Defendant's Exhibit 160. The proposed orders themselves are little more than form orders which would award the specific amounts requested in the event that Judge Cosetti granted the fee application.

G. The *Wisconsin Steel* Opinion and the Filing of this Motion

A watershed event in terms of the filing of the instant motion occurred on March 6, 1985, when Judge John F. Grady of the United States District Court for the Northern District of Illinois issued his opinion in *In re Wisconsin Steel Company*, 48 B.R. 753 (N.D. Ill. 1985). The *Wisconsin Steel* opinion attracted wide press coverage in legal journals and periodicals and quickly came to the attention of counsel for both parties to this action. Subsequent to learning of *Wisconsin Steel*, CSC counsel took certain actions which culminated in the filing of this motion.

The *Wisconsin Steel* case grew out of the sale of the Wisconsin Steel Works by International Harvester Company to purchasers collectively referred to as WSC. After experiencing financial difficulties, WSC filed for reorganization under Chapter 11 of the Bankruptcy Act. International Harvester filed a proof of claim against the bankrupt estate and WSC filed a counterclaim against International Harvester, alleging fraud in the sale of Wisconsin Steel. Harvester moved to dismiss the counterclaim for failure to state a claim upon which relief could be granted. The parties briefed the motion and the matter was taken under advisement by Bankruptcy Judge Charles B. McCormick.

On November 18, 1982, Judge McCormick issued an 11 page opinion denying Harvester's motion to dismiss.

After the parties undertook discovery in the adversary proceeding, a dispute arose over whether Harvester should produce certain communications which Harvester claimed were covered by the attorney-client privilege. The issue was briefed by the parties and taken under advisement by Judge McCormick. On January 7, 1985, Judge McCormick issued an 11 page opinion in which he ordered that the communications be produced.

Harvester's suspicions were subsequently aroused when questions developed over how Nachman, Munitz & Sweig ("Sweig"), counsel for WSC, had knowledge of the discovery order prior to counsel for Harvester. Harvester retained an expert who concluded on the basis of water marks and typewriting analysis that the November 18, 1982 and January 7, 1985 opinions of Judge McCormick were prepared by Sweig. These suspicions were confirmed at a hearing in the bankruptcy court during which Harvester moved to disqualify Judge McCormick and Sweig. Judge McCormick indicated that with regard to the 1985 order, he had asked Sweig to present a proposed order after concluding that he would likely rule in WSC's favor on the motion. Judge McCormick considered the proposed order for approximately six months, during which time he marked-up a copy of the order and had his law clerk draft an order which reached the same conclusion but under a different analysis. Eventually, Judge McCormick signed the order as submitted by Sweig. Judge McCormick denied Harvester's motion for disqualification and an immediate appeal was taken to the district court.

On appeal, Judge Grady concluded that the actions of Judge McCormick and Sweig violated Canon 3A(4) of the Code of Judicial Conduct, Bankruptcy Rule 9003, Disciplinary Rule 7-110(b) of the Illinois Code of Professional

Responsibility and Ethical Consideration 7-35 of the Illinois Code of Professional Responsibility. Canon 3A(4) of the Code of Judicial Conduct provides in relevant part: "Judges should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Bankruptcy Rule 9003 contains a similar proscription for attorneys: "Except as otherwise permitted by applicable law, any party in interest and any attorney . . . of a party in interest shall refrain from *ex parte* meetings and communications with the bankruptcy judge concerning matters affecting a particular case or proceeding."

Disciplinary Rule 7-110(b) of the Illinois Code of Professional Responsibility is identical to Directory Rule 7-110(B) of the Georgia Code of Professional Responsibility states as follows:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
>
> (1) in the course of official proceedings in the cause;
>
> (2) in writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer;
>
> (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer;
>
> (4) as otherwise authorized by law.

Ethical Consideration 7-35 of both the Illinois and Georgia Codes provide:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

Judge Grady initially rejected the defense that Judge McCormick had already made up his mind and counsel served merely as scrivener. As pointed out by Judge Grady, only Judge McCormick could actually know whether he was influenced by the proposed order. Judge Grady noted that the ethical rules do not prohibit "prejudicial" *ex parte* communications, but *ex parte* communications. Moreover, Judge McCormick's own comments belied his contention that he had already made up his mind and that, accordingly, Harvester was not prejudiced. Judge McCormick made at best a tentative decision to rule in WSC's favor and then carefully considered the proposed order prior to making a final ruling. As pointed out by Judge Grady, had Harvester been given an opportunity to submit a proposed order, Judge McCormick may have ruled in Harvester's favor.

Judge Grady also emphasized the appearance of impropriety created by Judge McCormick's and counsel's

actions, an appearance which was compounded by the concealment of these actions. As explained by Judge Grady:

> Every experienced lawyer and judge knows how important it is that litigations believe in the fairness of the process. No one likes to lose, but if an unfavorable decision is perceived to be the result of an impartial consideration, it is usually bearable. What cannot be tolerated is an unfavorable decision that is seen as not simply wrong, but unfair.
>
> When a judge issues an opinion, it is tangible evidence of the consideration that went into the decision. It provides assurance that an impartial third party analyzed the problem and independently came to a conclusion about the merits of the dispute. But the two opinions in question were not the work of a neutral arbiter. They were the work of Harvester's adversary, the very antithesis of what they purported to be.

48 B.R. at 762.

Judge Grady, in ruling in Harvester's favor on the appeal, granted certain relief, not as a disciplinary matter, but "for the purpose of resuscitating the integrity of [the] proceeding." *Id.* at 765 n.8. Judge Grady vacated and expunged the orders at issue, stating that "[t]hey are not what they purport to be, and they cannot be allowed to stand." *Id.* at 766. Judge Grady withdrew the adversary proceeding from the bankruptcy court and indicated that he would decide the two motions himself.

Judge Grady also disqualified Judge McCormick from further participation in the adversary proceeding, holding that "Judge McCormick's impartiality can reasonably be questioned." *Id.* at 763. Judge Grady also indicated that "the fact that Sweig was enlisted to write Judge McCormick's opinions without the knowledge of Harvester is

itself an indication of bias, at least in a broad sense, in favor of WSC and against Harvester." *Id.* at 764.

Finally, Judge Grady disqualified Sweig from further participation in the case. Judge Grady relied on the two-part test for attorney disqualification first set forth in *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), and quoted in *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985). Judge Grady also ruled that Nachman, Munitz & Sweig would be required to pay Harvester its attorneys' fees incurred in connection with the motion for disqualification as well as paying the fees for the time expended by substitute counsel for WSC in becoming familiar with the case.

The *Wisconsin Steel* opinion had a galvanizing effect on counsel for CSC, particularly the attorneys at Kirkpatrick & Lockhart. As explained by Mr. Cheever, who believed that the Powell, Goldstein attorneys suspected Alston & Bird of authorizing most if not all of Judge Robinson's orders, the case "piqued" his interest in the question of who was preparing Judge Robinson's orders. Transcript, Vol. 3 at 200. Cheever initially pursued the matter by circulating his March 29, 1985 memorandum. Tom Johnson followed up by raising the issue with Powell, Goldstein. On April 5, 1985, Johnson wrote a letter to Ken Shapiro in which he requested that Shapiro "consider with Jerry [Blackstock] and Larry [Bogart] how we might verify that Alston & Bird has ghostwritten orders or opinions for Judge Robinson." Defendant's Exhibit 205.

The Powell, Goldstein attorneys, particularly Jerry Blackstock, apparently were not especially anxious to pursue this matter and little was done other than to discuss the issue. *See* Transcript, Volume 3 at 110-115. On May 15, 1985, Mr. Johnson wrote a second letter to Shapiro, suggesting that he visually compare orders entered in the Colony Square case with Alston & Bird briefs. *See* Defendant's

Exhibit 206. Shapiro made a visual comparison of the orders and reported back to Johnson. According to Johnson, "[Shapiro's] review thoroughly convinces him that Alston & Bird prepared the June 25, 1984 title transfer order." Defendant's Exhibit 207. On May 20, 1985, Johnson telephoned Frank Bird to discuss a number of matters with him. During the course of the discussion, Johnson asked Bird if Alston & Bird had prepared the title order. Bird confirmed that Alston & Bird had written the order and Bird and Johnson discussed how this had come about. Johnson asked Bird what other orders Alston & Bird had prepared and Bird mentioned the September orders. Johnson summarized the discussion with Bird in a memorandum which he circulated among the CSC attorneys. Defendant's Exhibit 208. The memorandum does not indicate that Bird was hesitant to reply to Johnson's inquiries or that he sought to conceal Alston & Bird's actions. Johnson and Bird spoke again on May 21, 1984, regarding the issue of ghostwritten orders. Johnson told Bird that he had taken "careful notes of our May 20, 1985 conversation and would like to review them with him to make certain they are accurate." Defendant's Exhibit 209. Johnson then reviewed the previous conversation by paraphrasing a draft affidavit which he was in the process of revising. *Id.* This affidavit formed the basis of the motion for disqualification and other relief filed on June 6, 1985.

III. DUE PROCESS CONCERNS

The court's determination of whether CSC is entitled to any of the relief which it seeks must be prefaced by consideration of the propriety of the conduct which it challenges. As an initial matter, the court must express its disapproval of the manner in which the orders at issue were entered. The Fifth and Eleventh Circuit Court of Appeals have repeatedly discouraged a trial court's verbatim adoption of a party's proposed findings of fact and

conclusions of law. *See, e.g., Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 320 (11th Cir. 1983); *Keystone Plastics, Inc. v. C&P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975). The Supreme Court has also criticized this method of issuing decisions. *Anderson v. City of Bessemer City, N.C.*, ____ U.S. ____, 105 S.Ct. 1504, 1511 (1985). The courts have explained that the verbatim adoption of a proposed order submitted by one party presents a number of dangers, including overreaching and exaggeration by an attorney preparing an order with the knowledge that the judge has already decided to rule in that party's favor. *Id.* In addition, a reviewing court is deprived of the assurance that the trial court gave careful attention to the evidence and the arguments presented and reached a decision only after personal analysis.

The instant motion involves a situation which is potentially more serious than the adoption of one party's proposed findings of fact. In the typical situation considered by the appellate courts, a trial court will announce its decision orally and then request the prevailing party to submit a proposed order. Ideally, the losing party will be given the opportunity to commend on the proposal before the order is entered by the court. *See Keystone*, 506 F.2d at 962. While discouraged for the reasons discussed above, this procedure at least carries the safeguard that everyone concerned, including all parties and the reviewing court, are aware of the origin of the court's order.

When a judicial order is entered on the basis of a communication between the judge and the prevailing attorney without any prior notice to the losing side, the dangers discussed above are compounded. The potential for exaggeration and overreaching is heightened when an attorney learns that he has the opportunity to draft an opinion without the knowledge of opposing counsel. The reviewing court is not only deprived of the assurance that the trial court gave appropriate attention to the issues and

the evidence, but is misled into believing that the trial court performed the analysis reflected by the written opinion. The losing party, of course, is unable to bring the authorship of the opinion to the attention of a reviewing court because that party is itself kept in the dark. Finally, as apparently occurred in *Wisconsin Steel*, this procedure presents the possibility that a trial judge will reach merely a tentative decision in favor of one party and then will have this inclination solidified by reviewing the proposed order, without having the opportunity to consider a contrary result.

Despite the potential for abuse presented by the *ex parte* submission of proposed orders, Prudential contends that the manner in which the challenged orders were entered is authorized by law. In support of this argument, Prudential relies on the opinions of this court and of the Fifth Circuit Court of Appeals in *In re Georgia Paneling Supply, Inc.*, 607 F.2d 117 (5th Cir. 1979), *vacated* 613 F.2d 137 (5th Cir. 1979), *reinstated* 616 F.2d 893 (5th Cir. 1980). In *Georgia Paneling*, this court denied a motion challenging certain bankruptcy court orders, stating that "[t]he bankruptcy court's failure to request the submission of proposed findings of fact and conclusions of law from all parties was not exemplary but neither was it clearly erroneous." *In re Georgia Paneling Supply, Inc.*, Bankruptcy Case No. 74-1628A (N.D. Ga., Aug. 29, 1978) (Freeman, J.). *See* Defendant's Exhibit 186. The order of this court was appealed to the Fifth Circuit. In the brief filed with the Court of Appeals, the trustee acknowledged drafting proposed orders denying motions filed by the appellant. On appeal, the court noted that the bankruptcy judge was alleged to have engaged in *ex parte* discussions, permitted orders and an opinion to be drafted and typed by appellees or their counsel, and misrepresented the facts regarding this alleged misbehavior. The court of appeals held: "A careful examination of the record, especially those portions

cited by appellants, reveals no impropriety. The allegations of misconduct are unfounded." *In re Georgia Paneling Supply, Inc.*, 607 F.2d at 118.

Georgia Paneling provides at best questionable precedential value in this case. Neither this court nor the Court of Appeals directly addressed the issue of *ex parte* preparation and submission of orders without prior notice. Moreover, *Georgia Paneling* involved a situation in which orders were prepared by the trustee, who is appointed by the bankruptcy court. The preparation of orders by a trustee is significantly different from the adversary proceeding involved in this case. The court is unable to agree with Prudential that the Fifth Circuit opinion in *Georgia Paneling* should be construed as authorizing the *ex parte* entry of orders, particularly in view of the Fifth and Eleventh Circuits' repeated admonitions against the verbatim adoption of findings of fact.

While the adoption by a trial court of an order prepared by a litigant is clearly not preferred, utilization of this procedure nonetheless does not necessarily deny the losing party due process of law. Due process requires that a litigant be given notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). *Ex parte* contacts between a judge and a litigant will not always deprive the adversary of these due process attributes. When a party has been given the opportunity to participate actively in a proceeding and is not prejudiced by the *ex parte* contact, the requirements of due process have been met. *See Simer v. Rios*, 661 F.2d 655, 674 (7th Cir. 1981) ("[W]e reject any notion of due process which would place an absolute prohibition on all *ex parte* contacts or proceedings.").

It is clear that in the instant case, CSC has not been denied its due process rights. CSC was given notice of all hearings before Judge Robinson and was provided the

opportunity to set forth its views on the pending motions. A review of the transcripts of these hearings demonstrates that Judge Robinson was an active participant in the proceedings and was intimately familiar with the issues. *See, e.g.*, Defendants Exhibits 130, 136, 143 and 147. After holding hearings on the issues requiring adjudication, Judge Robinson determined that he would rule in Prudential's favor and then requested that counsel for Prudential draft and submit an appropriate order. In making these requests, Judge Robinson provided counsel with a framework for the particular order to be drafted. Upon receiving a proposed draft of the order, Judge Robinson would review it and make any necessary changes. As stated by Judge Robinson, the final order reflected the thinking of the court. *See* Judge Robinson's Answer to Interrogatory No. 3d. In sum, CSC was given notice of pending issues and an adequate opportunity to present its arguments prior to a decision being made by Judge Robinson. While this court would certainly prefer that the bankruptcy court had drafted its orders without the aid of counsel, the court concludes that the procedure used did not result in a denial of due process.

In addition to the fact that CSC was not denied due process during the course of the proceedings before the bankruptcy court, CSC was also afforded the opportunity for appellate review of the key decisions of the bankruptcy court. The critical issue decided in the title order involved a narrow question of law, i.e., whether the Chapter 11 proceeding in Pittsburgh stayed the Chapter XII proceeding pending before Judge Robinson. Upon receiving an adverse ruling by Judge Robinson on this question, CSC appealed the matter to this court where the issue was briefed and taken under consideration. On April 2, 1985, this court issued an opinion which also rejected the position taken by CSC. Contrary to the intimations of counsel for CSC, this court did not simply act as a rubber stamp for

the bankruptcy court. Rather, the April 2, 1985 order reflects the independent consideration and analysis of this court. Of course, CSC then had the opportunity to appeal the decision of this court to the Eleventh Circuit Court of Appeals. On January 10, 1986, the Court of Appeals affirmed the ruling of this court. The court pointed out that its affirmance was based on the appropriate reasoning of both the bankruptcy court and the district court.

CSC also had the opportunity to appeal the disqualification order to this court. The disqualification order was affirmed by order of this court dated March 12, 1985. This court had previously denied a motion for disqualification of Judge Robinson which had been filed in this court. While the appeal of the disqualification order was pending before this court, counsel for CSC had actual knowlege that Judge Robinson had requested Alston & Bird to prepare at least three orders. In addition, during this time period, Mr. Cheever was under the impression that the Powell, Goldstein attorneys believed Alston & Bird had written most if not all of Judge Robinson's orders. Yet, despite the fact that the appeal of the disqualification order was pending, CSC failed to bring this information to the attention of this court.

CSC has not shown that it was prejudiced by Alston & Bird's preparation of orders for Judge Robinson. CSC has alleged a number of ways in which it was purportedly prejudiced, none of which this court finds persuasive. First, CSC characterizes the proposed order submitted to Judge Robinson as additional "briefs." As stated by CSC, "[h]ad Colony Square been afforded a similar opportunity, or an opportunity to comment on the proposed opinions, Judge Robinson may have decided another way." CSC's post-hearing brief at 50. As discussed above, however, the evidence produced establishes that Judge Robinson reached his decisions and then requested Alston & Bird to prepare an order which discussed certain specific points.

CSC has presented no evidence that Judge Robinson made a tentative decision and then was persuaded by the proposed orders. In view of the evidence presented to this court, CSC's argument on this point is pure sophistry.

CSC next contends that it was deprived of the independent ruling of a neutral tribunal and of a fair adjudication of the issues. The court finds these conclusory contentions an insufficient basis upon which to claim prejudice. CSC also argues that Prudential gained a strategic and tactical advantage by reason of its advance knowledge of Judge Robinson's rulings. CSC's argument is mere speculation unsupported by evidence of actual prejudice.

CSC contends that Judge Cosetti may have ruled differently or faster on the motion presented to him on June 25, 1984 had he been fully informed. This argument is belied by Judge Cosetti's opinion, which expresses a sense of comity regarding the Atlanta bankruptcy court. CSC also asserts that it was unable to refute the statements set forth in Frank Bird's September 7, 1984 Affidavit. In fact, CSC could have refuted Mr. Bird's statement that he had no *ex parte* contact with Judge Robinson because CSC was aware that on August 29, 1984, Judge Robinson had contacted Mr. Bird and requested that he prepare certain orders.

As a final matter, CSC contends that this court may have ruled differently on the title order had this court been aware that the order was prepared by Alston & Bird. As discussed above, this court affirmed the title order after careful analysis of the law and the opposing arguments. This court believed on April 2, 1985, that the June 25, 1984 order of the bankruptcy court was correct as a matter of law, and this court continues to hold this belief as of the date.

The discussion above reflects the significant factual distinctions between this case and *Wisconsin Steel*. In *Wisconsin Steel*, the bankruptcy judge made at most a tentative decision to rule in favor of one party. As stated by Judge Grady, "There were, after all, only two possible alternatives—to grant the motion or to deny it. To make a tentative choice of one of two alternatives can hardly be called decisive." 48 B.R. at 763. The tentative nature of Judge McCormick's decision is important because his request for the submission of a proposed order provided Wisconsin Steel with an additional opportunity to persuade him. In contrast, there is no evidence of any hesitancy on the part of Judge Robinson. Judge Robinson did not simply request that Alston & Bird draft proposed orders but rather, he indicated the points he wanted made in these orders. In addition, before making his request to Alston & Bird, Judge Robinson held a number of hearings with respect to the disputed issues, during which he actively questioned the attorneys and discussed his own analysis of the issues. *See, e.g.*, Defendant's Exhibit 130 at 38-48. Judge Robinson promptly entered the orders in question upon receiving and reviewing them. In sum, unlike the situation presented in *Wisconsin Steel*, in this case the Alston & Bird attorneys can fairly be described as "scriveners".

IV. RELIEF REQUESTED

A. Expungement of Orders

CSC seeks to vacate and expunge the challenged orders on the basis of judicial and attorney misconduct. CSC also relies on Rule 60(b) of the Federal Rules of Civil Procedure which allows a court to relieve a party from an order by reason of (3) "fraud . . . misrepresentation, or other misconduct of an adverse party"; or (6) "any other reason justifying relief from the operation of the judgment."

As an initial matter, this court rejects CSC's contention that the challenged orders must be vacated as a matter of law without regard to whether these orders are correct or whether CSC has been prejudiced by the manner in which they were entered. Controlling precedent in this circuit establishes that an order is not void simply because it was prepared by a litigant and signed by the court rather than drafted by the court itself. *See, e.g., Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 320-1 (11th Cir. 1983); *Hamm v. Members of Board of Regents of State of Florida*, 708 F.2d 644, 650-1 (11th Cir. 1983); *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 543 (5th Cir. 1978); *Keystone Plastics, Inc. v. C&P Plastics, Inc.*, 506 F.2d 960, 962-3 (5th Cir. 1975). *See, also, United States v. El Paso Co.*, 682 F.2d 530, 540 n. 11 (5th Cir. 1982); *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650, 652-3 (5th Cir. Unit A, 1981). The court recognizes that these cases involve situations in which a trial court adopted proposed findings of fact submitted by a party rather than the *ex parte* submission of a proposed order. More significant, however, than the specific manner in which the challenged order is entered is the issue of whether the trial court adequately performed its role in the decision making process. In this case, as explained in the previous section, the evidence clearly establishes that Judge Robinson did not abdicate his decision making responsibility. Rather, "[t]he record reflects that the trial court fully comprehended the factual and legal issues and adequately performed the 'decision reaching process.'" *Odeco*, 663 F.2d at 653. The challenged orders are orders of the bankruptcy court and are entitled to be reviewed as such.[4]

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[4]In this regard, it is important to note that the two critical orders issued by Judge Robinson preceeding the title order, the March 26, 1984 order dismissing the first Chapter 11 case and the May 14, 1984 order severing the mismanagement claim, were both prepared in Judge Robinson's chambers.

CSC also has not shown that the challenged orders are erroneous and require expungement for this reason. Particular attention must be given to the title order and the disqualification order. The title order, of course, has been affirmed by this court and by the Eleventh Circuit Court of Appeals. Expunging this order and requiring *de novo* review of the issues adjudicated in the order would be a futile gesture. The disqualification order was previously affirmed by order of this court dated March 12, 1985. This court found then that the October 30, 1984 disqualification order entered by Judge Robinson was not erroneous. Upon further review of this order, the court continues to believe that the order is not erroneous.

In sum, CSC has not shown either that Judge Robinson abdicated his role in the adjudicative process or that the challenged orders are erroneous. In view of these conclusions, the court also rejects CSC's claim pursuant to Rule 60(b) that misconduct by Alston & Bird attorneys deprived it of a fair adjudication of the issues. CSC's motion to vacate and expunge the orders of the bankruptcy court will therefore be denied. CSC's motion to vacate the April 2, 1985 order of this court will also be denied.

B. Disqualification of Alston & Bird

CSC moves to disqualify the law firm of Alston & Bird from further participation in these proceedings. CSC relies on the two-part test for disqualification of counsel set forth in *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1210 (11th Cir. 1985):

> First, although there need not be proof of actual wrongdoing, "there must be at least a reasonable possibility that some specifically identifiable impropriety did occur." Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's

> continued participation in a particular case." (citations omitted).

Prudential argues that this request is without merit and is in any event untimely.

With respect to the first part of the disqualification test, the court finds that attorneys from Alston & Bird acted improperly by not complying with Director Rule 7-110(B) and Ethical Consideration 7-35 of the Georgia Code of Professional Responsibility. The mandate set forth in these rules is clear: A lawyer should not communicate in writing as to the merits of a cause with a judge unless a copy of the writing is promptly delivered to opposing counsel. It cannot seriously be contended that the submission of a proposed order ruling on a pending motion is anything other than a written communication as to the merits of a cause. Alston & Bird's failure to serve copies of these proposed orders on opposing counsel was inexplicable.

The second part of the disqualification test requires that the court weigh the degree to which the retention of Alston & Bird would erode public trust in the judiciary against Prudential's interest in retaining counsel of choice. *Kleiner*, 751 F.2d at 1210. The court concludes that the extraordinary circumstances presented by this litigation require that Prudential be allowed to continue to retain counsel of its choice. This costly and complex bankruptcy matter is, of course, in its second decade by now. Over the past five years, the litigation has proceeded in the Supreme Court of the United States; the Eleventh Circuit Court of Appeals; the Third Circuit Court of Appeals; the United States District Court for the Northern District of Georgia; the United States District Court for the Western District of Pennsylvania; the United States Bankruptcy Court for the Northern District of Georgia; the United States Bankruptcy Court for the Western District of Pennsylvania; the

Superior Court of Fulton County, Georgia; and the Court of Common Pleas of Allegheny County, Pennsylvania. During this time, Prudential has been continuously represented by Alston & Bird or its predecessor firm. The vast majority of the work performed by Alston & Bird is untainted by the more recent improprieties. Disqualification of Alston & Bird at this time would further prolong this already protracted litigation. In the context of these proceedings, disqualification of the firm would be an excessively harsh and drastic measure.

In concluding that Alston & Bird should be allowed to continue as counsel of record, the court has very carefully considered the representations made by Frank Bird to the Pittsburgh bankruptcy court and to this court. As noted above, Mr. Bird submitted an affidavit to this court in which he stated that he had had no *ex parte* contact with Judge Robinson. *See* Plaintiff's Exhibit 4. Prudential points out that Mr. Bird's affidavit was executed in response to CSC's contentions regarding the development of the Chapter XII Plan. In addition, Mr. Bird explained that he did not consider a request from a judge, who has already made his decision, to an attorney requesting the submission of an order to be an improper "*ex parte*" contact. According to Mr. Bird, consideration must be given to who initiated the conversation, what the conversation was about, and whether the conversation involved an attempt to influence the court. As explained by Mr. Bird, an improper *ex parte* contact "is where an attorney for a party seeks to persuade a judge to make a decision one way or the other in a matter before that judge and outside the presence of the other party." *See* Transcript, Vol. 1 at 108-110. Upon consideration of Mr. Bird's statement in the context in which it was made, as well as in view of the ambiguity regarding whether the submission of a proposed order at the direction of the court constitutes an *ex parte*

contact,[5] the court does not impute to Mr. Bird a willful desire to conceal his 1984 discussions with Judge Robinson from this court.

On June 25, 1984, three days after receiving a request from Judge Robinson to draft the title order, Mr. Bird stated to Judge Cosetti during the course of oral argument, "We don't know how Judge Robinson is going to rule. We think we have a good case for getting Prudential's deed. But that's in the breast of that court." Plaintiff's Exhibit 3 at 36. Although the court finds that this statement was unquestionably misleading, the court concludes that it does not provide grounds for the relief which CSC seeks. While this statement raises questions regarding Mr. Bird's credibility, the credibility of Mr. Bird has not proven to be a determinative factor in this proceeding. CSC has not shown that it incurred any harm as a result of Mr. Bird's misleading statement and the court does not find that Mr. Bird's conduct was so egregious as to require the disqualification of the law firm of Alston & Bird. The court also notes that the statement was made to Judge Cosetti, who of course would not be precluded from taking appropriate disciplinary action against Mr. Bird if he felt that he had been deceived.

C. Disqualification of Judge Robinson

CSC seeks to disqualify Judge Robinson under 28 U.S.C. § 455. Section 455 provides in relevant part as follows:

---

[5]For example, Black's Law Dictionary (5th ed. 1979) defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only." The Fifth Circuit has noted that "In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other." *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973) (quoting Black's Law Dictionary (4th Ed., 1968)).

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party . . ..

A motion to disqualify a judge must be timely filed. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983); *Delesdernier v. Portierie*, 666 F.2d 116 (5th Cir. 1982). A court must consider whether a party acted in a timely manner after learning of the facts which support the motion for disqualification.

The motion to disqualify Judge Robinson was not timely filed. CSC was informed on August 29, 1984, that Judge Robinson had requested that Alston & Bird prepare three orders. Two days later, CSC filed a motion in this court to disqualify Judge Robinson. In that motion, CSC alleged that Judge Robinson was personally biased and prejudiced against CSC and its counsel. In the instant motion, CSC argues that Judge Robinson's actions demonstrate *per se* bias against CSC mandating his disqualification. Yet, when CSC filed its August 31, 1984 motion for disqualification, it did not mention that only two days before the filing of the motion, Judge Robinson had requested that Alston & Bird prepare three orders. If CSC believed that the solicitation of orders by Judge Robinson reasonably placed his impartiality in question or demonstrated personal bias or prejudice, CSC should have brought the matter to the attention of the court and obtained a ruling during 1984.

Moreover, as of December 5, 1984, George Cheever was under the impression that the Powell, Goldstein attorneys believed most if not all of Judge Robinson's orders had been written by Alston & Bird. The possibility that Alston & Bird had drafted orders for Judge Robinson appears to have been given at least some thought by Jerry Blackstock and Ken Shapiro of Powell, Goldstein. Despite the fact that CSC's motion to disqualify Judge Robinson was pending before this court from August 31, 1984, until December 21, 1984, CSC made no effort to bring these suspicions to the attention of this court. Apparently only after the *Wisconsin Steel* opinion piqued Mr. Cheever's interest in the issue was any action taken by counsel for CSC. CSC raised the matter of Alston & Bird drafting orders for Judge Robinson before this court for the first time on June 6, 1985.

Even if the motion to disqualify Judge Robinson was timely, CSC has not met its burden under section 455. As a general rule, bias sufficient to disqualify a judge must stem from extrajudicial sources and must be focused against a party to a proceeding. *Hamm v. Members of Board of Regents of State of Florida*, 708 F.2d 647, 651 (11th Cir. 1983). While there is an exception to this rule for judicial conduct exhibiting prevasive bias, rulings adverse to a party will not suffice to constitute pervasive bias. *Id.* This court believes that the solicitation of orders from an attorney neither places a judge's impartiality reasonably in question nor demonstrates *per se* bias or prejudice against the losing party. This is particularly true in this case where this court has already determined that Judge Robinson adequately performed his decision-making responsibility. Indeed, the solicitation of orders by Judge Robinson was not unique to this case. Approximately one year before Judge Robinson requested that Alston & Bird prepare the title order, Judge Robinson requested the preparation of an order in another bankruptcy matter from Ken Shapiro, one

of the attorneys for CSC. At the time, it did not occur to Mr. Shapiro that this procedure might be improper. The court also notes that Judge Robinson has stated that he presumed "that counsel for the prevailing party would communicate with a Colony Square attorney regarding any draft which was prepared by counsel for the prevailing party; however I do not know whether counsel for the prevailing party did so." Judge Robinson's Answer to Interrogatory No. 8. Judge Robinson unquestionably should have ensured that counsel for CSC knew that Alston & Bird would be preparing and submitting orders rather than presuming such awareness. Nonetheless, because this court does not believe that Judge Robinson's actions demonstrate personal bias or place his impartiality reasonably in question, the court concludes that CSC has not established grounds for Judge Robinson's disqualification.

D. Attorneys' Fees

CSC seeks to recover its attorneys' fees under 28 U.S.C. § 1927 for the time spent in pursuing this motion as well as in connection with the motions which gave rise to an order prepared by Alston & Bird. This request will be denied. Prudential, on the other hand, seeks attorneys' fees under Rule 11, Fed. R. Civ. P., for the defense of this motion. Prudential contends that the motion was not filed in good faith and that counsel for CSC failed to conduct a reasonable inquiry into the facts or the law relevant to the motion. Although the court agrees that counsel did not inquire into the facts which gave rise to this motion as carefully as they should have, the court will nonetheless deny Prudential's motion. This matter could have been avoided had counsel for Prudential served copies of the proposed orders on counsel for CSC. Prudential and its counsel will be required to bear the costs which they incurred as a result of failing to take this action.

Accordingly, CSC's amended motion for disqualification and other relief is DENIED. Prudential's motion for attorneys' fees pursuant to Rule 11, Fed. R. Civ. P., is also DENIED.

SO ORDERED, this 9th day of MAY, 1986.

/s/ RICHARD C. FREEMAN
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:

COLONY SQUARE COMPANY,
Debtor.

Case No. 82-254

Pittsburgh, PA
April 7, 1982

BEFORE: HON. JOSEPH L. COSETTI

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* * *

. . . with the requirements of the Bankruptcy Act, it sought refuge in the Code, and the Court without any question and without any hesitation said you're absolutely wrong; you shouldn't be here. I say the same thing to this debtor. It shouldn't be here. But, Your Honor, I am not saying that it should not be in court. It has an effective jurisdiction and effective court and effective statutory protection for its rights. Thank you.

THE COURT: You're essentially saying if they're proposing a modification, it should be in Atlanta?

MR. SYKES: That's correct.

THE COURT: Or comply with the plan?

MR. SYKES: That's correct.

THE COURT: How do you answer his argument what if the plan called for a payment of a couple million dollars each year over 25 years and about the 15th or 16th or 17th year if the judge, when he approved the plan, said he was retaining jurisdiction, would you still argue that that order was proper to retain jurisdiction that long?

MR. SYKES: Your Honor, I think that there comes a time when, as the debtor has said, jurisdiction of a bankruptcy court must end. We are not faced with that situation here. If I were faced with that situation, I would have to look at what the rights of the unsecured creditors were at the time, what the rights of Prudential or any other secured creditors were at the time and what the rights of the debtor were.

I don't believe the assertion that the period of time could be extended to 50 years, and we would come in and make the same argument. It isn't an appropriate matter for this Court to determine, because that's not before you. We

gave the debtor what we felt was a substantial period of time in order to make the payment that is required of it.

THE COURT: Does anyone else want to make any other argument?

MR. BIRD: Your Honor, just on your last point, I have to agree with counsel that it would be absurd to expect the Atlanta court to extend all rights of the parties whenever they're situated. The documents that were integral to the plan were the lease, . . .

* * *

IN THE UNITED STATES BANKRUPTCY COURT
THE NORTHERN DISTRICT OF GEORGIA
THE ATLANTA DIVISION

IN THE MATTER OF:

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, Debtor.

Case number B75-3523 A

Transcript of the proceedings heard before THE HONORABLE HUGH ROBINSON, Judge, commencing at approximately 10:00 o'clock, a.m., on the 22nd day of June, 1984, in the Richard B. Russell Federal Building, Atlanta, Georgia.

APPEARANCES:

For the Movant: FRANCIS M. BIRD, JR.,
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For the Respondent: THOMAS R. JOHNSON,
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THE COURT: Well, let me understand this. You're saying that because there's now an Eleven up in Pittsburgh, which there is—

MR. JOHNSON: An involuntary Seven converted to an Eleven.

THE COURT: Yeah, I understand that. You see, my analysis is this—and I want to make it clear for the record. My analysis and my order was that this Court as a Chapter Twelve Court retained exclusive jurisdiction over this

debt. That's not to say that there couldn't be another Eleven concerning other debts of Colony Square, in another Court. That Court would have jurisdiction over those debts, but this Court has exclusive jurisdiction over this particular debt, as a Chapter Twelve Court. In my mind, that means that no other Court can deal with this debt except this Chapter Twelve Court. That, to my mind, means that there is no argument that can be made that this Court is stayed. That is implicit in my ruling. Now, if you want me to be explicit, I've just been explicit.

Colony Square hereby submits the foregoing as the Appendix to its petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

(3)

No. 85-2041

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

COLONY SQUARE COMPANY,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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July 14, 1986

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ISSUES PRESENTED

Petitioner filed a voluntary bankruptcy proceeding under Chapter XII of the now repealed Bankruptcy Act of 1898. As part of the confirmed plan of arrangement, it assumed certain obligations with respect to various debts and property. To supervise and enforce the arrangement, the bankruptcy court retained exclusive jurisdiction of the relevant property, parties, and subject matter. In order to avoid these obligations and to defeat the jurisdiction of the bankruptcy court, petitioner then filed a second bankruptcy petition in another jurisdiction under the newly enacted Bankruptcy Act of 1978, which it claimed superseded and stayed its previously filed, though still pending, Chapter XII proceeding. Certain parties affiliated with petitioner also filed an involuntary petition, thereby initiating a third case, which petitioner likewise claimed superseded and stayed the pending proceedings in the first case. Courts in both jurisdictions issued a variety of orders and rulings to protect the jurisdiction of the original bankruptcy court and to enforce the terms of the debtor's plan of arrangement.

The question presented is:

> Did the Court below err in holding that, in light of the terms of the agreements of the parties, the original plan of arrangement, the original confirmation order and applicable law, the bankruptcy court acted properly to protect its jurisdiction over the debts, property and parties in the original, still-pending bankruptcy action filed by petitioner, and to enforce the undertakings of the petitioner as the debtor therein?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Colony Square Company, a Georgia Limited Partnership, and the respondent, The Prudential Insurance Company of America.[1]

[1] Pursuant to Rule 28.1 of this Court, The Prudential Insurance Company of America states that it has no non-wholly-owned subsidiaries or affiliates that have outstanding securities in the hands of the public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-2041

COLONY SQUARE COMPANY,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

The Prudential Insurance Company of America ("Prudential") files this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner, Colony Square Company ("Colony").

OPINIONS BELOW

Although styled as a petition to review two opinions of the United States Court of Appeals for the Eleventh Circuit dated January 10, 1986 and May 6, 1986 (reported at 779 F.2d 653 and 788 F.2d 739, and reproduced at Pet. App. 1a and 5a, respectively), the petition in effect

seeks review of the entire procedural history of three related cases. The complex course of proceedings in these three cases is only partially set out in the more than twenty decisions and orders of two panels of the Court of Appeals for the Eleventh Circuit, the District Courts for the Northern District of Georgia and the Western District of Pennsylvania, and the Bankruptcy Courts for the Northern District of Georgia and the Western District of Pennsylvania that are contained in the Appendix to the Petition.

COUNTERSTATEMENT OF THE CASE

A. Colony's 1975 Petition Under Chapter XII of The Bankruptcy Act and the Bankruptcy Court's Retention of Jurisdiction

On October 16, 1975, Colony filed in the Bankruptcy Court for the Northern District of Georgia a voluntary petition under Chapter XII of the Bankruptcy Act of 1898 (the "Act"). On March 30, 1977, the Chapter XII Plan ("Plan") proposed by Prudential, Colony's largest creditor, was confirmed by order of that court, after substantial negotiation and agreement by Colony. Colony's debt to Prudential was *not* discharged. (Pet. at 19.) Rather, under the terms of the Plan and Confirmation Order ("Order"), Prudential and Colony entered into a series of relationships and agreements whereby Colony was to repay its debt and the Court retained exclusive jurisdiction over the parties to enforce the terms of the Plan.

Pursuant to the Plan, Prudential and Colony entered into a relationship as landlord (Colony) and tenant (Prudential) with regard to certain real property generally known as the Colony Square Complex (the "Property"), while at the same time maintaining the previously established relationship of lender (Prudential) and borrower (Colony). The Property also was security for Colony's debt to Prudential. Under the Lease, Prudential was to take possession of and operate the Property for a

period initially ending December 31, 1981. Colony had the right to terminate the Lease and redeem possession of the Property by (a) paying Prudential's debt, or by bringing Prudential's debt current, and (b) reimbursing Prudential for its cash contribution in excess of five million dollars, necessary to fund the Plan, as well as paying Prudential for substantial capital and leasehold improvements made to the Property during the period of Prudential's possession and management. (Pet. App. 28a.)

Under the terms of a Moratorium Agreement entered into concurrently with the Lease, Prudential postponed for the original term of the Lease its right to enforce its claims based on Colony's indebtedness, provided that, among other requirements, Colony made certain annual cash contributions. If Colony did not perform its annual obligations or redeem the Property by paying Prudential's debt (or at least by bringing its debt to Prudential current) and making the extra reimbursement payments, Prudential could then exercise its remedies set forth in the Plan documents. A specific remedy available to Prudential, negotiated by the parties and approved by the court (as were all aspects of the agreements), was the option to purchase the Property in lieu of foreclosure in exchange for cancellation of Colony's indebtedness to Prudential. (Pet. App. 28a-29a.)

Both the Plan and the Order, by their express terms, provided that the Bankruptcy Court retained its exclusive jurisdiction under the statute, *see* Bankruptcy Act, Sec. 411, former 11 U.S.C. § 811, to enforce the rights and obligations of the parties under the Plan.[1] The Order

---

[1] Specifically, the Plan, ¶ IV(B)(2) (Pet. App. 65a), provided that:

> "Following confirmation, the Court will (i) retain jurisdiction to supervise the effectuation of this plan and to issue ancillary orders as may be necessary in connection therewith, and (ii) retain exclusive jurisdiction over the Remaining Property to

also provided that the general injunction prohibiting further creditor suits against Colony did not apply to Prudential. Instead, the order specifically authorized Prudential to exercise the remedies provided for it in the Plan including, without limitation, the provisions of the Lease and Moratorium Agreement.[2]

Because the Plan remained to be carried out, and Colony's debt to Prudential was not discharged, no final decree was issued in the original Chapter XII bankruptcy proceeding and the case remained and continues to remain open.

B. Colony's Failure to Meet Its Obligation Under the Plan and Prudential's Exercise of Its Option to Require a Deed in Lieu of Foreclosure

From confirmation in March 1977 until 1981, Colony met its obligations under the Plan, never once complaining, as it had the right to do, of any alleged mismanagement of the Property by Prudential.[3] In October 1981, however, Colony failed to make its required $300,000 cash contribution; it also failed to pay Prudential in full or bring its debt current. Accordingly, under the terms

---

supervise and enforce the compliance by CSC and Prudential with their agreements with each other. . . ."

The Order, ¶ (f) (Pet. App. 65a), provided that:

"This Court shall retain jurisdiction to enforce this order and the Plan. . . . [T]his Court shall, as provided in the Plan, retain exclusive jurisdiction of the Debtor's property leased to Prudential for the purpose of enforcing the provisions of the Plan with respect thereto."

[2] In this regard, the Moratorium Agreement, ¶¶ 3.03, 7.01, provided that "Colony shall not assert any claim against Prudential" in reduction of the amount owed to Prudential "but instead shall maintain any such claim by separate action."

[3] If Colony were to object to Prudential's management, Prudential had the opportunity under the Lease to cure any alleged default. Lease, ¶ 15.1. (Pet. App. 39a-40a.)

of the Plan, Colony's entire debt to Prudential became due and payable on January 1, 1982.

On January 8, 1982, Prudential notified Colony that it was exercising its option to require a deed in lieu of foreclosure for the Property. Prudential also set a time for the tender of the requisite documentation on January 29, 1982. (Pet. App. 30a.)

C. Colony's Unsuccessful Efforts to Avoid Its Obligations Under the Plan

In an effort to avoid its obligations under the Plan, Colony immediately embarked on an elaborate series of procedural maneuvers and collateral litigation which continues to the present.

1. *Colony's Second Bankruptcy Case*

On January 28, 1982, one day before the tender was to take place, Colony filed in the Bankruptcy Court for the Western District of Pennsylvania a Petition for Reorganization ("Case Two") under Chapter 11, Title 11, United States Code, as amended by the Bankruptcy Reform Act of 1978 (the "1978 Reform Act").[4] Colony argued that, under the stay provisions of the Code, 11 U.S.C. § 362, the filing of this new petition superseded and stayed its obligations in its pending bankruptcy proceeding in Georgia and, indeed, divested the Georgia Bankruptcy Court of jurisdiction. The United States District Court for the Western District of Pennsylvania rejected this argument, *Prudential Insurance Co. of America v. Colony Square*, 29 B.R. 432 (W.D. Pa. 1983) and, following Colony's unsuccessful attempts to appeal

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[4] The 1978 Reform Act, which became effective starting October 1, 1979, superseded the Bankruptcy Act of 1898 ("Act") except with respect to pending cases commenced under the Act. *See* Section 403(a), Pub. L. No. 95-598, 92 Stat. 2683 (1978), note preceding 11 U.S.C. § 101, and *Central Trust Co. v. Official Creditors Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 375 (1982), discussed *infra* at pp. 13, 15.

that ruling, Case Two was transferred to the District Court for the Northern District of Georgia. On February 2, 1984, the Georgia District Court referred Case Two to the Bankruptcy Court for the Northern District of Georgia, which had retained jurisdiction over the parties, property and debts at issue in Colony's pending bankruptcy proceeding.[5]

2. *Prudential's Motion to Compel Compliance With the Plan*

On February 9, 1984, Prudential filed a motion in the Chapter XII case in the Georgia Bankruptcy Court to compel Colony's compliance with the Plan. In response Colony once again argued that the filing of its second bankruptcy petition (Case Two) triggered the stay provisions of the newly enacted Code, 11 U.S.C. § 362, thereby superseding and suspending any further proceedings to enforce the terms of the Plan in the still pending Chapter XII case. Colony also argued that it was entitled to assert claims that Prudential mismanaged the Property as "affirmative defenses" in opposition to Prudential's motion. After full briefing and several hearings, on May 14, 1984, the Bankruptcy Court issued a detailed opinion and order in the Chapter XII case (a) denying Colony's request to consider Colony's claims against Prudential as an affirmative defense to Prudential's motion to compel compliance with the Plan,[6] and (b) scheduling a final hearing on Prudential's motion to compel compliance. (Pet. App. 57a.)

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[5] Because Case Two involved property already subject to administration in the pending proceeding and because the provisions of the new Bankruptcy Code do not apply to proceedings filed under the Act, the Georgia Bankruptcy Court, on March 26, 1984, dismissed Case Two for lack of subject matter jurisdiction.

[6] The Court severed Colony's mismanagement and other claims so that they might be maintained in a separate action for damages, as provided in the Moratorium Agreement.

3. *Colony's Third Bankruptcy Case*

In the meantime, following the dismissal of Case Two, on April 30, 1984, unsecured creditors affiliated with certain of Colony's limited partners filed an "involuntary" petition under Chapter 7 of the Code against Colony in the Pittsburgh Bankruptcy Court. Colony then voluntarily converted this "involuntary" Chapter 7 case to a Chapter 11 case under the Code on June 20, 1984 ("Case Three").

4. *The Georgia Bankruptcy Court's Orders Declining to Stay Its Proceedings, Enforcing the Plan and Protecting Its Jurisdiction*

On June 22, 1984, the Georgia Bankruptcy Court held the final evidentiary hearing on Prudential's motion to compel compliance with the Plan, after which, on June 25, 1984, the Bankruptcy Court entered an Order enforcing the Plan and Order.

Relying on the analysis implicit in its prior Order dismissing Case Two for lack of subject matter jurisdiction, the Bankruptcy Court also rejected Colony's argument that the Court and Prudential were stayed from further proceedings by the filing of Case Three. (Pet. App. 46a-47a.) Counsel for Colony then threatened to bring an immediate contempt action in Pittsburgh, if Prudential proceeded with the hearing.[7] (Tr. 6/22/84 at 4.) To avoid disruption of the Georgia bankruptcy proceedings, Prudential filed a motion for the issuance of an order in aid of the Court's jurisdiction. After a further hearing, on June 25, 1984, the Georgia Bankruptcy Court issued an order precluding Colony, its counsel, partners, and creditors, from pursuing further proceedings in any other court (other than on appeal) with respect to the

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[7] In fact, Colony did so and also brought a Motion for Temporary Restraining Order before the Pittsburgh Bankruptcy Court, which declined to act.

Property and its undischarged debt to Prudential. (Pet. App. 45a.)

D. The Decisions of the Georgia District Court Affirming (i) the Order Enforcing the Confirmation Order and the Chapter XII Plan, (ii) the Order in Aid of Jurisdiction, and (iii) the Order Dismissing Case Two

Colony appealed all of the rulings of the Georgia Bankruptcy Court to the United States District Court for the Northern District of Georgia.

On April 2, 1985, in a long and thorough opinion, the District Court affirmed (i) the Bankruptcy Court's June 25, 1984 order enforcing the Plan and Order and (ii) its May 4, 1984 order severing trial of Colony's claims against Prudential from proceedings on Prudential's motion to enforce the Plan.[8] (Pet. App. 26a.)

On June 28, 1985, in two additional, carefully reasoned opinions, the District Court affirmed (i) the Bankruptcy Court's March 26, 1985 order dismissing Case Two as well as (ii) its order in aid of jurisdiction (also entered on June 25, 1984). (Pet. App. 11a, 18a.)

E. The Decisions of the Court of Appeals

Colony appealed all of the rulings of the District Court to the United States Court of Appeals for the Eleventh Circuit.

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[8] It also vacated the provisional stay pending appeal of the June 25, 1984 Order. In response, Colony filed an "Emergency Motion to the United States Court of Appeals for the Eleventh Circuit for Stay of Judgment and Order Pending Appeal" which was denied on April 8, 1985. Colony immediately filed a similar emergency motion in the United States Supreme Court. This motion was also denied, on April 11, 1985, by The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit.

1. *Case No. 85-8216*

On January 10, 1986, a panel of the Court of Appeals affirmed *per curiam* the District Court's decision that the bankruptcy court correctly determined that the filing and pendency of the Pittsburgh bankruptcy case did not prevent the Georgia bankruptcy court from enforcing the prior Plan. (Pet. App. 5a.) The Court of Appeals held that the 1978 Reform Act, including the new Code and its stay provisions, 11 U.S.C. § 362, on which Colony based its claims, did not apply to pending bankruptcy cases filed under the prior Act. In so holding, it relied on the unequivocal language of Section 403 (a) of the 1978 Reform Act and on this Court's equally clear ruling in *Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 357 (1982), that prior pending bankruptcy cases "shall be conducted and determined under such Act as if [the 1978 Reform Act] had not been enacted." In addition, the Court based its ruling on the fact that the original Georgia bankruptcy case was still pending and that the Bankruptcy Court had expressly retained exclusive jurisdiction over the Plan, the property at issue and the parties.

The Court of Appeals also held that the District Court did not err in affirming the Bankruptcy Court's exercise of its discretion (and its construction and application of the parties' agreements) in concluding that Colony could not assert a defense of mismanagement in connection with Prudential's action to enforce the Plan, but would have to maintain such claims in a separate action for damages. In so doing, the Court relied on the terms of the agreements between the parties embodied in the Plan.

2. *Case Nos. 85-8568 and 85-8569*

On May 6, 1986, a different panel of the Court of Appeals ruled that the District Court correctly held that the bankruptcy court did not abuse its discretion when it ordered Colony and its affiliates not to pursue collateral

bankruptcy proceedings involving the property subject to the pending Georgia bankruptcy case. (Pet. App. 1a.) Relying on its prior holding in *In re Macon Uplands Venture v. Metropolitan Life Insurance Co.*, 624 F.2d 261 (5th Cir. 1980), the Court of Appeals stressed that the bankruptcy court had the power, in aid of its jurisdiction (retained by the Order and by agreement of the parties) over the pending proceeding, to prevent Colony (and others) from filing actions that touch on the property of the pending proceeding.[9]

The Court of Appeals also held that the District Court did not err in affirming the Georgia Bankruptcy Court's dismissal of Colony's second bankruptcy case. The Court found that its resolution of this issue was "compelled" by its prior ruling that Colony's second bankruptcy case did not stay the prior proceedings before the Georgia Bankruptcy Court.

REASONS FOR DENYING CERTIORARI

The petition should be denied because the holdings of the Court of Appeals below were correct, are not in conflict with the holdings of this Court or any other Court of Appeals, and do not present an important question for resolution by this Court.

The Court of Appeals' decisions do not have wide-ranging precedential value. They turned in significant part upon the unique factual and procedural circumstances of the cases below, involving the interpretation and effect of specific provisions in a particular bankruptcy plan and confirmation order as well as related agreements between the parties. They also addressed the applicability of the Bankruptcy Reform Act of 1978 to a pending bankruptcy proceeding filed under a prior statute. It is unlikely that the same issues would arise in the future, as petitioner itself implicitly concedes when it

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[9] Because none of Colony's creditors were before the Court of Appeals, it declined to decide whether the order was overly broad.

refers to the "fortuitous circumstance" involved in its own case. (Pet. at 24.)

Nor do the Court of Appeals' decisions involve novel or difficult holdings as to which there is substantial ground for disagreement. As framed by the decisions of the Court of Appeals, the issues raised and decided below were straightforward and clear cut, and bear little or no resemblance to the convoluted issues presented in the petition. In affirming the various decisions of the Bankruptcy Court and the District Court with respect to implementation of the bankruptcy plan and related agreements by petitioner, the Court of Appeals followed the clear and controlling precedents of this Court and analogous decisions of other Courts of Appeal. The decisions below do not conflict in any way with the holdings of this Court or any other Court of Appeals.

I. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

A. The Holdings Below Were Based on the Terms of the Bankruptcy Plan and Order and on the Unique Procedural Circumstances of this Case

The Court of Appeals' decisions present no question of general public importance for this Court's review because the rulings below were based in large part on the meaning and effect of the specific terms of the agreements between the parties and the original Confirmation Order of the Georgia Bankruptcy Court, as well as on the highly unusual and complex procedural posture of these cases.

All of the rulings for which review is sought stem from petitioner's repeated and inappropriate efforts to evade its obligations in a pending bankruptcy proceeding by filing numerous cases and appeals in different courts. It was in that specific context and based on the terms of the Lease and Moratorium Agreement between the parties, the Plan of Arrangement and the Confirmation Or-

der of the Bankruptcy Court, that the Court of Appeals decided the issues for which review is sought. Many of these issues involved the careful exercise of discretion by the Georgia Bankruptcy Court with respect to the conduct of the bankruptcy proceeding pending before it.

Under these circumstances, the decisions below do not present issues of general public importance beyond the interests of the particular parties involved. They are therefore not appropriate for this Court's certiorari review. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955)) (issues must be "beyond the academic or episodic").

In an effort to secure Supreme Court review, petitioner ignores the narrow basis of the Court of Appeals' decisions and suggests that they establish broad, new standards for the conduct of bankruptcy proceedings generally. This claim is refuted by the Court of Appeals' own recognition of the limited issues it was addressing.[10]

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[10] In Case No. 85-8216, the Court stated:

> ". . . [T]he first . . . is whether the automatic stay provision of Section 362 prevented the Atlanta Bankruptcy Court from enforcing the plan while the Pittsburgh bankruptcy case was still pending." (Pet. App. 8a.)
>
> "The second issue is whether the district court properly held that Colony Square could not assert a defense of willful and negligent mismanagement against Prudential in connection with Prudential's action to enforce the plan." (Pet. App. 9a.)

In Case Nos. 85-8568 and 85-8569, the Court stated:

> "The sole question before us in 85-8569 is whether the district court was correct in holding that the bankruptcy court did not abuse its discretion when it enjoined Colony Square." (Pet. App. 3a.)
>
> "The sole issue [in 85-8568] is whether the district court erred in affirming the Atlanta Bankruptcy Court's dismissal of Colony Square's voluntary Chapter 11 case." (Pet. App. 4a.)

B. The Applicability of the Bankruptcy Reform Act of 1978 to Previously Pending Bankruptcy Proceedings Is Not a Question of Continuing or Recurring Importance

At bottom, petitioner's varied claims all assume that the provisions of the new Bankruptcy Code, effective on October 1, 1979, apply to its prior pending bankruptcy proceedings before the Georgia Bankruptcy Court. The inapplicability of the new Bankruptcy Code to prior, pending bankruptcy proceedings was authoritatively determined by this Court four years ago in *Central Trust Co. v. Official Creditors Committee of Geiger Enterprises, Inc.*, 454 U.S. 354 (1982). *See* pp. 14-15 *infra*. There is no need for the Court to revisit this question now. Nothing has happened in the meantime to suggest that the Court's *Central Trust* decision needs reevaluation or further explication.

Further, given the passage of almost eight years since the 1978 Reform Act, issues relating to the new Code's application to previously pending Bankruptcy Act proceedings are not likely to arise in the future. As petitioner itself recognizes, the inapplicability of the new Code to prior, pending proceedings "is a purely fortuitous circumstance" (Pet. 24) which raises an issue (if at all) only with respect to debtors "caught in the transition period between the Act and the Code." (Pet. 25) Accordingly, the petition does not present a live question of general public importance for this Court to decide. *See, e.g., United States v. Abrams*, 344 U.S. 855 (1952); *Sokol Brothers Furniture Co. v. Commissioner*, 340 U.S. 952 (1951) (certiorari denied where statutes at issue expired or were amended).

II. THE COURT OF APPEALS' DECISIONS WERE CORRECT AND DO NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

A. The Court of Appeals Properly Concluded that Petitioner's Second (and Third) Bankruptcy Petitions Did Not Prevent the Georgia Bankruptcy Court from Enforcing the Plan

The essence of Colony's petition is that it has a right to perpetually reorganize by filing (or by voluntarily converting) subsequent bankruptcy petitions which, under the stay provisions of the Code, 11 U.S.C. § 362, supersede and suspend proceedings in its prior, pending case. The Court of Appeals below as well as two different District Courts correctly ruled that Colony cannot so conveniently avoid its obligations. These holdings were correct, are in complete accordance with (and indeed are controlled by) the decisions of this Court, and do not conflict with the decisions of any other Court of Appeals.

The Court of Appeals properly held that Section 403(a) of the 1978 Reform Act precludes the procedural result sought by Colony.[11] Colony's Chapter XII case was commenced under the prior Bankruptcy Act. Section 403(a) requires that it be conducted and determined as if the 1978 Reform Act, including the new Code, had never been enacted. As a result, the stay provisions of the Code on which Colony relies do not apply to petitioner's pending

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[11] Section 403(a) provides:

> A case *commenced* under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, *shall be conducted and determined under such Act as if this Act [the Bankruptcy Reform Act of 1978] had not been enacted, and the substantive rights of the parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.*

(Emphasis added.)

Chapter XII proceeding. In reaching this decision, the Court below correctly relied on the clear and unqualified holding of this Court in *Central Trust Co. v. Official Creditors Committee of Geiger Enterprises, Inc.*, 454 U.S. 354 (1982):

> The language of 403(a) is unequivocal. It provides that cases filed under the Bankruptcy Act '*shall* be conducted and determined under such Act as if [the 1978 Reform Act, including the new Code] had not been enacted. It makes *no* exception for petitions to be refiled under the New Code; indeed, it expressly provides that petitions such as Geiger's '*shall* continue to be governed' by the Bankruptcy Act.

454 U.S. at 357 (emphasis in original).[12]

The decisions of the Court below do not conflict with but, rather, are controlled by *Central Trust Co.* They do not extend but faithfully apply that decision. There is no support in the opinion in *Central Trust* (or in the opinion in any other case) for the proposition that the holding of *Central Trust* is confined to the artificial circumstances posited by petitioner, *i.e.*, petitions which are filed under the Code only a few weeks after petitions filed under the prior Act. Quite the contrary, other courts have not taken so restrictive a view of either Section 403(a) of the Code or this Court's decision in *Central Trust. See, e.g., 1616 Reminc Limited Partnership v. Atchison & Keller Co.*, 704 F.2d 1313 (4th Cir. 1983); *In re Lemmons & Co.*, 742 F.2d 1064 (7th Cir. 1984); *In re Macon Uplands Venture*, 7 B.R. 293, 301 (M.D. Ga. 1980); *In re Lincoln Plaza Towers Associates*, 6 B.R. 808, 815 (Bankr. S.D.N.Y. 1980).

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[12] The Court also noted that the legislative history of Section 403(a) provides that "[t]hose cases will proceed as though this Act had not taken effect. This section applies to substantive as well as procedural matters." 454 U.S. at 358 n.1.

Even without regard to the effect of Section 403(a), there is no genuine issue as to the correctness of the rulings below. By the terms of the agreements between the parties and the Confirmation Order of the Georgia Bankruptcy Court, the property in dispute and the relationships arising out of the Plan are subject to the exclusive jurisdiction of that Court. Colony's debt to Prudential had not been discharged and those proceedings were not closed. This Court's decision in *Freshman v. Atkins*, 269 U.S. 121 (1925), makes clear that the pendency of a bankruptcy case proscribes the filing of subsequent petitions seeking discharge of the same debts and involving the same property.[13] Petitioner's efforts to distinguish *Freshman* as involving a situation in which no discharge had been granted are misplaced, since there was *no discharge* of Colony's indebtedness to Prudential and Colony's prior bankruptcy proceeding was still pending—just like the one in *Freshman*.

In order to avoid the dispositive fact that the Georgia Bankruptcy Court expressly retained jurisdiction to enforce the Plan agreed to by petitioner, Colony mistakenly suggests that the opinion below conflicts with a forty-three-year-old case in another circuit. *In re Flatbush Ave.-Nevins St. Corp.*, 133 F.2d 760, 762 (2d Cir. 1943). There is no conflict. Indeed, even if *Flatbush* could still be said to represent the current views of the Second Circuit,[14] it is completely in accord with the decisions below, since it held that although a bankruptcy court could not "wet nurse" every aspect of a debtor's business indefinitely, the court was certainly able to interpret and

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[13] Petitioner cannot complain that the ruling below "fractured" the estate of the debtor when it was petitioner's own actions in seeking to avoid its obligations under the Plan that resulted in any "fracturing" of the estate.

[14] *See e.g. Guardian Mortgage Investors v. Unofficial Noteholders-Debentureholders Creditors Committee*, 607 F.2d 1020 (2d Cir. 1979); *Prudence-Bonds Corp. v. City Bank Farmers Trust Co.*, 186 F.2d 525 (2d Cir. 1951).

enforce the terms of the plan of reorganization then before it. This is precisely what happened in this case. Given the unassailable logic of this result, it is not surprising that other courts have come to the same conclusion and there are no conflicts with the decisions below.[15] *See, e.g., In re Matter of Springpark Association*, 623 F.2d 1377 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980); *In re Tilco, Inc.*, 558 F.2d 1369 (10th Cir. 1977); *Jefferson v. Mississippi Gulf Craft YMCA, Inc.*, 59 B.R. 708 (Bankr. S.D. Miss. 1986).

B. The Court of Appeals Properly Concluded that the Order Severing Petitioner's Mismanagement Claims Was a Proper Exercise of the Bankruptcy Court's Discretion

Petitioner sought to defeat Prudential's efforts to enforce its rights under the Plan by attempting to raise affirmative defenses based on Prudential's alleged mismanagement of the leased property. Based upon the unequivocal language the Moratorium Agreement between Colony and Prudential, which expressly provides that "Colony shall not assert any claim against Prudential" in reduction of the amount owed to Prudential "but instead shall maintain any such claim by separate action," ¶¶ 3.03, 7.01, the courts below ruled that the parties did not intend the quality of Prudential's performance as a manager under the Lease to be a condition of its rights as a lender under the Moratorium Agreement.

This ruling is unquestionably correct, and petitioner does not seriously suggest that it is in direct and intolerable conflict with the decisions of this Court or those of any other Court of Appeals. The Court of Appeals'

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[15] Petitioner attempts to create "conflicts" by ignoring the factual and procedural differences between cases it cites and the case below. These are not the sort of genuine, irreconcilable conflicts of law which might support Supreme Court review. *See, e.g., Layne & Bowler Corp. v. Western Well Works, supra.*

ruling on the legal meaning and effect of a contract is inappropriate for Supreme Court review since, as petitioner itself concedes, the Court does not sit to interpret the state law of contracts. (Pet. 27.) Moreover, and in any event, Supreme Court review of the lower court's construction of the terms of specific agreements would not be appropriate because the Court does not sit "to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984), or even to correct simple errors by the lower courts. *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 85-2041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, *Petitioner*,
v.
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

Underlying each of the questions presented in the petition is Petitioner's contention that a federal bankruptcy court, as affirmed by a district court and court of appeals, should not be permitted to arrogate to itself the power to hold a reorganized enterprise in tutelage on the strength of a purported retention of jurisdiction in a plan of reorganization, especially where clear and unambiguous decisional and statutory law prohibit such a usurpation of power. In a predictable and formulaic fashion, Respondent has attempted to render this contention—resting, as it does, on core principles of limited judicial power, respect for congressional enactments, and harmony with the national bankruptcy policy—as fact-specific, as "turn[ing]

in significant part upon the unique factual and procedural circumstances of the cases below." (Brief in Opposition at 10.) Respondent's arguments in support of its position are unavailing, as demonstrated in this brief Reply.

1. Respondent contends that the decisions below were based on a factually unique plan of reorganization and confirmation order, thus rendering the issues "academic or episodic" and inappropriate for this Court's review. (Brief in Opposition at 11-12.) To support this conclusion, Respondent relies on one case involving a woman's claim for damages because a cemetery refused to bury her husband, *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), and on what Chief Justice Taft termed "an ordinary patent" case involving an apparatus for drawing water from deep wells, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). The present case is about an important feature of the developing national bankruptcy policy, not about burial rights or well water. At issue is an unresolved tension in the law that resonates not only through the present litigation but also through other judicial decisions, *e.g., In re Flatbush Ave.—Nevins St. Corp.*, 133 F.2d 760, 762 (2d Cir. 1943) ("Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . , have power to remain a wet-nurse to the reorganized company. [It] cannot obtain that power merely by inserting a provision reserving jurisdiction."); through academic commentaries, *e.g.*, 6A *Collier on Bankruptcy*, ¶ 11.20 at 315 (14th ed. 1977) ("court lacks power to keep the reorganized enterprise in tutelage"); Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 Harv. L. Rev. 759, 769 (1984) ("corporation can obtain repeated discharge"); and, at the risk of belaboring the obvious, through *successive* congressional enactments, 11 U.S.C. §§ 727(a), 1141(d); 11 U.S.C. § 32c(5) (repealed). In an age in which, as a society, we

apparently expect our bankruptcy courts to adjust enormous social and economic cleavages such as the asbestos tragedy and the restructuring of the domestic steel industry, it is difficult to imagine a less fact-specific set of issues than those presented in the instant petition.

2. Respondent persists in its attempt to characterize this as a case in which Petitioner has sought to avail itself of rights under the Code that did not exist under the Act,[1] thus triggering the applicability of Section 403(a) of the 1978 Reform Act. This is simply untrue. Both the Act, 11 U.S.C. § 32c(5) (repealed), and the Code, 11 U.S.C. §§ 727(a), 1141(d), contain provisions that unequivocally ground Petitioner's right to engage in successive bankruptcy proceedings consistent with the "six year rule." Hence, even if one were to accept Respondent's argument that the present proceeding should be governed by the now-repealed Act—a result that Petitioner would not resist if only the Act could be resurrected—the identical issues would be joined. By their contortions of this Court's decision in *Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354 (1982), Respondent and the Eleventh Circuit afford Petitioner the protection of *neither* the Code *nor* the Act. With respect, Petitioner does not read *Geiger* to disenfranchise a bankruptcy debtor from *both* statutes. Section 403(a), on which *Geiger* relies, is a transition provision, not a weapon by which creditors simultaneously strip a debtor of rights under both statutes.

3. Respondent maintains that the decisions below are correct. (Brief in Opposition at 14-18.) In doing so, however, Respondent revealingly departs from its earlier and

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[1]Consistent with the Petition, the Bankruptcy Act of 1898, as amended, will be referred to in this Reply as the "Act," and the Bankruptcy Reform Act of 1978, which replaced the Act, will be referred to as the "Code."

self-serving characterization of the case as fact-specific. No longer is this a case about a unique plan of reorganization and confirmation order. Now, according to Respondent, the case involves the "clear" rule of law that "the pendency of a bankruptcy case proscribes the filing of subsequent petitions seeking discharge of the same debts and involving the same property." (Brief in Opposition at 16.) This rule of law, of course, is neither clear nor fact-specific, as evidenced by Respondent's reliance on an otherwise inapposite sixty-one-year-old decision of this Court, *Freshman v. Atkins*, 269 U.S. 121 (1925),[2] which, although brought to the lower court's attention by Respondent, was not cited by the Court of Appeals in either decision for which review is sought.

4. Finally, Respondent contends that there is no conflict with decisions in other circuits. Indeed, says Respon-

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[2]The vintage of this case cited by Respondent demonstrates the pedigree, importance, and recurring nature of the issues presented in the petition, as does Petitioner's reliance on the forty-three-year-old case of *Flatbush Ave.*, which Respondent openly ridicules based on its age. (Brief in Opposition at 16.) The problem with Respondent's reliance on *Freshman* is not its age, but the fact that (a) the case stands for the opposite of how Respondent portrays it since the Court there did *not* dismiss the second bankruptcy proceeding on jurisdictional grounds but rather allowed the second proceeding to continue; (b) the first proceeding in *Freshman* resulted in no final action, unlike the first proceeding here; (c) the first proceeding in *Freshman* resulted in *no* discharge while, consistent with the statutory six-year rule's requirement that the first proceeding result in *a* discharge, the first proceeding here did result in a massive discharge and reorganization; (d) *Freshman*, by definition, involved no post-discharge debts requiring a new proceeding, whereas Petitioner has incurred debts subsequent to its first discharge; and, perhaps most revealingly, (e) the statutory provision on which *Freshman* was premised was repealed in 1938. As to the last point, Respondent's discussion of *Freshman* ignores the basic distinction between the debtor's bankruptcy case and his application for discharge, which, in accordance with the provision repealed in 1938, was merely an ancillary proceeding within the case.

dent, two other circuits have reached "the same conclusion" as the Eleventh Circuit here. (Brief in Opposition at 17.) The cases relied on by Respondent with such apparent assurance deserve a moment's scrutiny. Respondent cites *In re Springpark Associates*, 623 F.2d 1377 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980). Yet this case involved a first bankruptcy proceeding commenced in February 1976; a "settlement agreement" on refinancing between the debtor and creditor allowing the debtor to emerge from bankruptcy; a subsequent violation of the settlement agreement by the debtor; and a second bankruptcy proceeding commenced on December 30, 1976, as to which the court lifted the Bankruptcy Act's automatic stay. Unlike the present case, *Springpark* involved *no* dismissal of the second proceeding on jurisdictional grounds; *no* application of the six-year rule; and *no* purported retention of jurisdiction by the bankruptcy court. The cited case is so factually and procedurally distinct from the present one that it offers no support whatsoever for Respondent.

Even wider of the mark is *In re Tilco, Inc.*, 558 F.2d 1369 (10th Cir. 1977), which Respondent says reaches "the same conclusion" as the decisions below. However, *Tilco* does not even involve a second bankruptcy filing. The case concerns whether, by way of a retention of jurisdiction in a plan of reorganization, a bankruptcy court can authorize a trustee to reject executory contracts. To extrapolate from these facts the principle that a retention of jurisdiction suffices, contrary to both the Act and the Code, to nullify a reorganized enterprise's right to commence a second bankruptcy proceeding is to reveal the inadequacy of Respondent's position.

Petitioner contends that the decisions below flatly contradict a number of federal court decisions discussed at pages 15-19 of the Petition. *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960); *In re Flatbush Ave.—Nevins St.*

Corp., 133 F.2d 760, 762 (2d Cir. 1943); *Clinton Trust Co. v. John H. Elliott Leather Co.*, 132 F.2d 299, 303 (2d Cir. 1942); *In re Hale*, 274 F. Supp. 813 (W.D. Va. 1967); *Indiana National Bank v. Lones*, 50 Bankr. 801 (Bankr. W.D. Ky. 1985). In response, Respondent asserts weakly that *Guardian Mortgage Investors v. Unofficial Noteholders-Debentureholders Creditors Committee*, 607 F.2d 1020 (2d Cir. 1979), establishes the absence of a conflict with the Second Circuit. (Brief in Opposition at 16.) Once again, the cited case is far afield. *Guardian Mortgage* involved the proper line of demarcation between the jurisdictional reach, respectively, of the Bankruptcy Act and of the Securities Exchange Act of 1934. The case involved the proper jurisdictional basis for a suit brought by a debtor-in-possession against certain creditors over the contents of solicitation materials. It involved *no* second bankruptcy proceeding; *no* six-year rule implications; *no* retention of jurisdiction by a bankruptcy court in a plan of reorganization; and *no* decision on a bankruptcy court's power to deny a discharge based on equitable grounds that are contrary to the clear terms of the governing statute. It hardly requires mention that the asserted conflicts easily survive Respondent's critique.[3]

[3]Similarly, the earlier Second Circuit decision cited by Respondent, *Prudence-Bonds Corp. v. City Bank Farmers Trust Co.*, 186 F.2d 525 (2d Cir. 1951), has no bearing on the present case. It involved post-confirmation jurisdiction to alter a plan of reorganization, which, in fact, the Second Circuit said should be exercised sparingly, that is, only when the "circumstances peremptorily demand it." *Id.* at 528.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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